

INTERNATIONAL INSOLVENCY INSTITUTE

International Insolvency in the New Millennium

Co-ordinating Cross-Border Insolvency Cases

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New York, New York

June 11 - 12, 2001

About the International Insolvency Institute ...

The International Insolvency Institute is a non-profit, limited-membership organization dedicated to advancing and promoting insolvency as a respected discipline in the international field. Its primary objectives include improving international co-operation in the insolvency area and achieving greater co-ordination among nations in multinational business reorganizations and restructurings.

Further information on the Institute and the first stage of the Institute's electronic collection of insolvency resources appears on the Institute's web site (under development at *iiiglobal.org*). The Institute welcomes contributions to its international insolvency resource centre of articles and comments from insolvency professionals, judges and academics on topics of international or domestic insolvency or secured transactions interest. We appreciate everyone's interest in the complex and intriguing field of international insolvency.

[*Author's Note:* This paper is presented on behalf of the International Insolvency Institute but the views expressed in the paper are those of the author and are not meant to be taken as reflecting an officially-approved position of the International Insolvency Institute. The paper is based on a paper that was first delivered at the INSOL/UNCITRAL Colloquium on Cross-Border Insolvency held in Vienna in December, 2000.]

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Co-ordinating Cross-Border Insolvency Cases

1. The Globalization of Business and the Globalization of Reorganizations and Restructurings

The tremendous advances in information technology within the last fifteen years have made it possible for businesses to operate in a variety of different countries at the same time and to link all of these operations as if they were right next door. A multinational business operating profitably and internationally can make decisions quickly that affect its global operations; it can allocate resources internationally in a manner which best suits its objectives and it can utilize its going-concern values to augment the value of its underlying operating assets on the basis that the whole is greater than the sum of the parts.

The onset of an insolvency case, however, stops all that and turns the business into a series of disconnected segments in several different countries. In a typical international insolvency, different sets of creditors assert different kinds of claims to different assets under different rules in different countries. The international business that was once carried on comes to an end and separate, unconnected remnants of the organization attempt to continue until they either starve or implode. It is almost as if a cross-border insolvency system had been set up deliberately to *promote* failures and liquidations.

The structural framework for dealing with multinational and cross-border businesses that encounter financial difficulties has hardly evolved from the state it was in several decades ago although our recent experience and developments that are on the horizon hold the promise of significant improvements and the prospect of the domestic adoption of the UNCITRAL Model Law is becoming more and more encouraging. There have been initial and limited domestic legislative initiatives into the area of co-operation in international insolvencies and restructurings but until the UNCITRAL Model Law is widely enacted, however, the legal structure internationally for enterprises in financial difficulty can best be described as compartmentalized. When insolvency or financial failure affects a

multinational business, it is still most commonly dealt with through a variety of independent, separate and often-unconnected administrations, most often for different, if not conflicting, purposes.

Consider the contrast in domestic terms as if traditional international insolvency rules applied to a domestic business in financial difficulty. Suppose that the financially-troubled business had operations in New York, Chicago and Los Angeles instead of in England, France and the United States. After a filing, the portions of the business in New York, Chicago and Los Angeles would be run separately by different court-appointed officials. None of the courts involved would be obliged to recognize orders made by another court and there would be severe pressure from local creditors for local courts to ignore the proceedings in the other courts entirely. Legislation would typically prefer local creditors over others. Transactions between the different portions of the business would grind to a halt. Receivables would be collected in the jurisdiction of the account debtor and would not be released to any of the other courts or creditors. Internationally, this has been the traditional result in cross-border cases and it is only relatively recently that the insolvency profession and the courts have been able to work toward a system that pays more attention to the interests of the stakeholders than to issues of the national sovereignty of the jurisdictions involved.

The dual impact of globalization and technological innovation has changed international commerce forever. Transactions involving multinational businesses can be carried out in mere seconds, regardless of the geographical location of the parties to the transaction. Transactions among units of the same global enterprise have also moved firmly into the 21st century but, where unforeseen or unfortunate circumstances lead to the need for reorganizations or restructurings, the pace of communication among jurisdictions reverts to the 19th century. By and large, the stakeholders of the global business are the losers in this technological regression.

This paper is intended to explore means by which current technology can be made to assist in the revival and rehabilitation of global businesses in financial difficulty. The paper suggests that, on the whole, significant

stakeholder value can be preserved and maintained if communications between courts in multinational and cross-border cases are facilitated and enhanced. Significantly, moreover, there are means by which this increased level of cooperation can be achieved without in any way compromising or infringing upon the local domestic practices and procedures that exist in the courts involved.

The UNCITRAL Model Law (which has become adapted as Chapter 15 of the proposed new Bankruptcy Code) clearly mandates a high level of cooperation among courts in multinational cases and guidelines for communications among courts are consistent with the aims and objectives of the Model Law and, in fact, further those aims and objectives and facilitates the more effective use of the Model Law in cross-border cases among countries which adopt it.

2. Preservation of Value Through Coordinating Cross-Border Administrations

The most logical and obvious solution to improving the current state of international co-operation in insolvencies and reorganizations would be a multinational treaty or convention to deal with insolvencies and reorganizations of multinational businesses. In practice, however, multinational treaties and conventions have proved exceptionally difficult to arrive at. There are very few functioning examples of international treaties on insolvency and reorganizations. The European efforts that have taken almost 30 years to approach fruition perhaps illustrate the difficulty in negotiating an effective international insolvency convention. Clearly, multinational conventions cannot be expected to be the primary means of achieving significant improvement in the international insolvency area.

Bilateral treaties between countries are another option. These are easier to negotiate but there are still very few examples of functioning bilateral treaties in existence. The difficulty with bilateral treaties as well as with multinational treaties is that they become exercises in the negotiation of sovereign rights. What is needed more is an appreciation that treaties or conventions on international insolvency and reorganizations really primarily represent the regulation of commercial interests in the event of a

financial failure. As long as the negotiation of treaties remains in the realm of sovereignty and national interest, the road toward a successful conclusion of a treaty or convention will be hard to find and successful efforts will be few and far between.

In the absence of effective treaty or convention arrangements, the choice in a multinational or cross-border insolvency or reorganization seems to be primarily between a primary/secondary jurisdiction structure for an administration on the one hand and a concurrent/parallel proceedings structure on the other. In concept, a primary/secondary jurisdiction model would involve a filing in the primary jurisdiction where the debtor's central operations are located and subsequent secondary filings in jurisdictions where other assets are located. In the concurrent/parallel jurisdiction model, the reorganizing business would file full proceedings in both the jurisdiction where its central operations are located and in other jurisdictions where key assets are located.

In a genuine primary/secondary model, the secondary jurisdiction would defer in major respects to the primary jurisdiction even, perhaps, to the point of turning over assets for administration in the primary jurisdiction. Conceptual difficulties will arise, of course, where the first case to be filed is in the "secondary" jurisdiction rather than the jurisdiction of the debtor's central operations. Moreover, recent experience has shown that some businesses opt to locate their offices in jurisdictions that are inconvenient for the creditors, thereby giving rise to an initial threshold issue in the proceedings as to which jurisdiction is the primary jurisdiction and which jurisdiction is the secondary jurisdiction. In addition, experience has shown that courts in all countries continue to be influenced by the interests of domestic creditors and that the courts of one jurisdiction are generally reluctant to yield authority or concede primacy to the courts of another. Consequently, administrations that appear to fall within the primary/secondary model may in fact actually be examples of the concurrent/parallel proceedings model.

It is clear, however, that courts in different countries are capable of cooperating with each other and coordinating their administrations in the case of a cross-border or multinational reorganization or insolvency. The

key to this increased willingness to cooperate and coordinate may well lie in the experience gained from Cross-Border Insolvency Protocols that have been negotiated in recent cases and from the example of the International Bar Association's Cross-Border Insolvency Concordat (which is discussed below).

Recent international experience with concurrent proceedings shows that orderly administrations of portions of business entities in different countries can be successfully carried out. The concurrent proceedings model recognizes the reality of a situation in which the courts of one jurisdiction are reluctant to yield their jurisdiction to the courts of another but wish to coordinate their administrations. By working concurrently but also in concert, administrations in more than one country can be carried out in a harmonized fashion which will be to the benefit of all of the stakeholders involved in the process.

3. Protocols in Cross-Border Cases

Assisted immeasurably by the insolvency profession around the world, practices and procedures are developing which can co-ordinate and harmonize insolvency and restructuring proceedings that involve more than one country. Because of the continuing absence of international insolvency treaties and conventions that could deal effectively with multinational insolvencies and reorganizations, progress in the international insolvency area is highly dependent on the efforts of the insolvency community to develop structures and solutions to cross-border and multinational financial problems.

Co-operation among nations in cross-border insolvency cases has been steadily increasing. Over the last half-dozen years, courts in different countries have entered into agreements and understandings with other courts in transnational cases and have, in several cases, made complementary orders in their respective jurisdictions to harmonize administrations in cross-border cases. Increasingly, agreed-upon arrangements which are approved by the Courts involved to deal with issues that assist with the harmonization and the co-ordination of the proceedings before the two courts have been entered into to facilitate cross-

border reorganizations. These arrangements are developing into a pattern and have become known colloquially as Cross-Border Insolvency Protocols.

The basis for the increased use of Cross-Border Insolvency Protocols is, in large part, derived from the work of the Insolvency and Creditors' Rights Committee of the International Bar Association. Over a period of several years, the Insolvency and Creditors' Rights Committee, working through a multi-country Subcommittee comprised of representatives of over 25 countries and judges from eight countries, developed a Cross-Border Insolvency Concordat. The Concordat was formally adopted by the Council of the Section on Business Law of the International Bar Association as its Twelfth Biennial Meeting in Paris in September, 1995 and was adopted by the full Council of the International Bar Association itself at its meeting in Madrid in May, 1996. A copy of the Concordat is attached as Appendix 1 to this paper.

The Cross-Border Insolvency Concordat provided guidelines for cross-border insolvencies and reorganizations which the parties or the Courts could adopt as practical solutions to cross-border issues arising in proceedings in different countries. The basis for the Concordat was that an insolvency regime that was predictable, fair and convenient would promote international trade and commerce. Commerce among nations would clearly be enhanced and facilitated by an international understanding that particular principles or guidelines would be available in the event of a business failure or reorganization. As the insolvency profession has gained experience with cross-border insolvency cases, cross-border insolvency protocols based on the example of the Concordat have become more common and certain common themes and approaches in protocols have developed.

The first major modern protocol was developed in *Maxwell Communication* which had administrations in both the United States and England. Thereafter, a more modest protocol was developed between Canada and the United States in *Re Olympia & York Developments Limited*. Shortly after the adoption of the International Bar Association's Cross-Border Insolvency Concordat, another Canada-U.S. protocol was developed in

Re Everfresh Beverages Inc. which involved two of the Judges who had participated in the deliberations leading to the development of the Concordat. Subsequently, protocols have been developed between the United States and Israel (*Re Nakash*), between the Bahamas and the United States (*Re Commodore Business Machines*) and, between Switzerland and the United States (*Re AIOC Corporation*). A well-developed protocol emerged from a case between the United States and Canada (*Re Solv-Ex Corporation*). In *Solv-Ex* not only was a full protocol approved by the Courts in the two countries but, for the first time, the Courts actually held several simultaneous joint hearings during the proceedings. More recent cross-border cases between United States and Canada have seen the development of more comprehensive forms of protocol and, in one recent major case, a protocol was actually entered into as a First Day Order (i.e., *Re Loewen Group Inc.*, (Del.)). A listing of major cross-border insolvency protocols is attached as Appendix 2 to this paper.

There is no prescribed format for a typical Cross-Border Insolvency Protocol. Protocols are intended to address the issues that are important to the actual case before the Courts and these factors will vary from case to case. Nor is a Protocol expected to continue for the duration of an entire case without amendment or modification. Protocols are intended to reflect and facilitate solutions to particular problems and, as the dynamics in a multinational case change over the course of the case, additional issues may arise which may require additional provisions in the Protocol. Protocols, therefore, invariably provide for amendments or modifications which, in turn, must be approved by both of the Courts involved.

Protocols are intended to reflect the harmonization of procedural rather than substantive issues between jurisdictions. Protocols typically deal with such items as co-ordination of court hearings in the two or more jurisdictions, co-ordination of procedures dealing with the financing or sale of assets, co-ordination in pursuing recoveries for the benefit or creditors generally, equality of treatment among the general body of unsecured creditors, co-ordination of claims filing processes and, ultimately, co-ordination and harmonization of plans in different jurisdictions. Procedurally, recent cases have tended to use Cross-Border Insolvency Protocols from the early stages of a case. Protocols, however, are

invariably expressed to be effective only upon their adoption and approval by each of the Courts involved in accordance with the local law and practice of each local jurisdiction.

The increased use of Cross-Border Insolvency Protocols and their acceptance by the courts is a very positive development for stakeholders involved in multinational businesses in financial difficulty. Under traditional approaches, similar attempts at multinational reorganizations might have simply disintegrated as a result of creditors and courts in different countries attempting to seize the high ground and take jurisdiction over an entire case (or at least over all the assets) regardless of the creditors and the courts in another jurisdiction. Cross-border insolvency filings these days, however, have been characterized by a high degree of respect by the Courts of each country for the other.

As businesses tend to become more international and more global, there will be more opportunities and circumstances in which Cross-Border Insolvency Protocols can be implemented for the benefit of all of the stakeholders of the business involved. The solutions to cross-border issues that Protocols deal with have the potential to develop into a set of rules and precedents which, in turn, may evolve into a form of “common law” of cross-border and multinational reorganizations. The use of Cross-Border Insolvency Protocols has been a major step forward in the progress toward ever-increasing levels of international cooperation in cross-border and multinational insolvencies and reorganizations.

4. The Developing Practice of Court-to-Court Communications

As Mr. Justice J.M. Farley of the Ontario Superior Court of Justice observed some time ago, (in “A Judicial Perspective on International Co-operation in Insolvency Cases” in the *American Bankruptcy Institute Journal*: March, 1998 at page 12), reorganizational cases involve “real time litigation” where matters must often be dealt with urgently if there is to be anything left to save. This contrasts with “autopsy litigation” where it “doesn’t matter much whether the case is dealt with this month or next year”. It is also increasingly important that courts in different countries that are faced with administering different segments of the same global enterprise at the same

time should be aware of what each other is doing so as to ensure that the value of the enterprise can be maintained for the benefit of all of its stakeholders. There have been amazing advances in technology over the last half-dozen years and it is encouraging to see a trend developing where courts in insolvency cases are taking advantage of opportunities presented by these kinds of advances.

The most recent example of technology assisting a joint country-to-country administration of a case took place in *Re Loewen Group Inc.* Loewen was the second largest funeral services company in North America at the time of its financial difficulties and it filed under Canada's CCAA in Toronto and under Chapter 11 in Delaware. The case was highly complex and the parties and the Courts all recognized that it was essential that communication be maintained between the two countries. To that end, a joint Court hearing was held between the Ontario Superior Court of Justice in Toronto (Mr. Justice J. M. Farley) and the United States Bankruptcy Court for the District of Delaware in Wilmington (Chief Judge Peter J. Walsh).

The Court hearing featured a complete report to both Courts by counsel for the company and for the Creditors' Committee. Reports were made to both jurisdictions and the Judges in both Courts were able to converse with each other and ask questions of counsel in the other jurisdiction. Absent this kind of technological co-operation, comparable communications between the Courts in the two countries on the issues involved in the hearing might have taken several weeks but, with some advance preparation, matters were dealt in less than two hours. The hearing was so successful that it is quite likely that *Loewen* will further feature joint hearings by satellite television as the case proceeds. Similar cross-border satellite television hearings have recently been held in two other Canada/United States cases, i.e. *Re Livent Inc.* (Toronto and New York) and *Re AgriBioTech Inc.* (Toronto and Nevada).

In another technologically-assisted hearing Bankruptcy Court hearing, Judge Sidney Brooks (Colorado) last year held a transatlantic hearing at which evidence was given by Liquidators in England to a hearing in Denver before Judge Brooks concerning property in the People's Republic

of China. It is encouraging for the insolvency profession that the globalization of businesses is being matched with global communications in cross-border insolvency cases when the interests of justice and the proper administration of the case determines that to be appropriate.

5. The UNCITRAL Model Law On Cross-Border Insolvency

The United Nations Commission on International Trade Law (UNCITRAL) is a major United Nations organization headquartered in Vienna, Austria which has undertaken exhaustive studies and reviews in many significant areas of international commercial law. Its efforts have led to a number of international conventions and model laws which have been widely adopted around the world and, most recently, produced the Model Law on Cross-Border Insolvency.

UNCITRAL began a study of the feasibility of achieving higher levels of co-operation in the international insolvency area in April 1994, as a result of an international insolvency colloquium in Vienna sponsored with Insol International. The objective in developing the Model Law was to establish a set of uniform principles that would deal with the requirements which a foreign insolvency representative would need to meet in order to have access to the courts of other countries in cross-border cases. The Model Law Project, however, evolved into a much broader work and ultimately became an agreed-upon international model for domestic legislation dealing with cross-border insolvencies that could be adopted anywhere in the world with or without variations that would reflect local domestic practices and procedures. The Official Text of the Model Law has now been published and widely disseminated and is available on UNCITRAL's web site at <http://www.UNCITRAL.org> and on the International Insolvency Institute web site at www.iiiglobal.org.

The primary goal of the Model Law is to facilitate domestic recognition of foreign insolvency proceedings and to increase international co-operation in multinational cases. Foreign insolvency proceedings are divided into two categories in the Model Law, i.e., "main" proceedings and "non-main" proceedings. A main proceeding is one which takes place in the country where the debtor has its main operations. If the foreign proceeding is

recognized as a *main* proceeding, the Model Law provides for an automatic stay of proceedings by creditors against the debtor's assets and the suspension of the right to transfer, encumber or otherwise dispose of the debtor's assets. The scope and terms of the stay of proceedings are subject to the normal requirements of domestic law.

The Model Law contemplates a high level of co-operation between courts in cross-border cases. Domestic courts are directed to co-operate “to the maximum extent possible” with foreign courts and foreign insolvency representatives in the Model Law: Article 26. The courts may communicate directly with each other and may request information or assistance directly from the foreign court or from the foreign insolvency representative: Article 25. Co-operation can, for example, consist of appointing someone to act on the direction of the court, communicating information by any means considered appropriate by the court and co-ordinating the administration of the debtor's assets and affairs in both jurisdictions: Article 27. The courts may also approve or implement agreements concerning the co-ordination of concurrent proceedings involving the same debtor: Article 30.

In May, 2000, Mexico became the first major economy in the world to officially adopt the UNCITRAL Model Law on Cross-Border Insolvency as part of its domestic insolvency legislation. An unofficial translation of Part XII of the New Mexican Insolvency Act (incorporating the provisions of the UNCITRAL Model Law) is available on the International Insolvency Institute web site (iiiglobal.org). As everyone will be aware, the United States has been poised for some time to enact the Model Law although the progress of the Model Law toward legislative enactment has been slowed by controversies over domestic issues.

In November, 2000, the Parliament of South Africa passed legislation to enact the UNCITRAL Model Law. (Bill No. 4B-2000, passed November 2, 2000). The most significant point of departure between the South African legislation and the Model Law is a provision that makes the South African legislation applicable to “officially designated” countries. This designation is accomplished by notice from the appropriate Government Ministry and the Ministry may, by a comparable notice, withdraw the designation of any

country. The process is not as routine as it appears because both types of notices must be approved by the South African Parliament before they become official. The introduction of the Model Law into Mexico and South Africa will provide an impetus to other countries who are currently studying its adoption. If the Model Law is widely adopted in domestic insolvency legislation around the world it will move international insolvency co-operation to an entirely new and higher plane.

6. Proposal for a Model Voluntary Cross-Border Restructuring Statute

In a significant new initiative, the UNCITRAL Working Group assembled by the U.S. State Department has produced a proposal for the development of a system that would facilitate and enhance voluntary out-of-court restructurings in multinational cases. The primary author of the background statement which describes and outlines the potential development of a legislative system for these kinds of cases is Donald Bernstein of New York who drew considerable support and assistance from Prof. Jay L. Westbrook of Austin and from Dan Glosband of Boston who has been the official representative of the International Bar Association to UNCITRAL for several years. A copy of a recent draft of the discussion and presentation of the concept of a statute to promote out-of-court restructurings on an international scale is attached as Appendix 3 to this report.

The working paper on the topic was discussed at an International Insolvency Colloquium hosted by UNCITRAL in Vienna in December 2000. Several other international initiatives were also canvassed and discussed at the Colloquium including a proposal from the Lenders Working Group of Insol International for a set of principles that could be agreed upon among major financial institutions involved in complex multinational reorganizations (as described in greater detail below). There are points of distinction between the proposal for a model statute and the Insol principles but there are also large areas in which the two concepts complement each other. The Insol principles seem to be derived from the "London Approach" to major reorganizations whereas the model statute concept clearly envisages a legislative framework that would be applicable to major institutions in cross-border and multinational cases.

The UNCITRAL Colloquium considered and discussed new initiatives to be pursued in the international insolvency area. Over 160 delegates attended from 50 to 75 countries worldwide drawn from insolvency practitioners, members of the insolvency judiciary, insolvency academics and representatives of the public sector. The prospect that a serious new international initiative will emerge from the Colloquium is not be underestimated. It was a similar UNCITRAL Colloquium in Vienna in April 1994 that produced the impetus that eventually became the Model Law on Cross-Border Insolvency which seems to be on its way to being legislatively adopted in a number of major countries around the world. The UNCITRAL Colloquium in December 2000 in fact produced the impetus for a *Legislative Guide on Insolvency Law* which is intended to reflect internationally-accepted best practices for major insolvency concepts and procedures which could be recommended by UNCITRAL to countries that are in the process of developing or reforming their own domestic insolvency legislation.

7. Insol Lenders Group: Principles for a Global Approach to Multi-Creditor Workouts

Insol International is an international organization comprised of insolvency practitioners with an emphasis on practitioners from the accounting and lending professions. A number of major financial institutions who support Insol have organized themselves into an Insol Lenders Group. This Group has been in the process of developing a statement of principles for cooperation among financial institutions during multinational reorganizations. The Chair of the Lenders Group is a senior banker from HSBC in London and the Vice-Chair is a senior workout specialist with Barclays in London. The members of the Lenders Working Group have discussed their *Statement of Principles for a Global Approach to Multi-Creditor Workouts* with lending institutions around the world. A copy of the *Statement of Principles* is attached as Appendix 4 to this report. The complete text of the *Principles* contains an extensive commentary on their implementation which is too voluminous to reproduce in this paper, but it may be found on the International Insolvency Institute web site at iiiglobal.org.

8. Recent Selected International Insolvency Decisions:-

(a) *Principles for Co-ordination of Administrations in Cross-Border Cases:-*

As everyone will appreciate, international cases are becoming more and more common but there is not yet a great deal of guidance on how courts in different countries should co-ordinate their administrations for the benefit of the stakeholders involved. A Canadian court, however, has recently set out a succinct statement of the principles applicable to co-operation between courts in different countries in multinational cases and, at the same time, has established new ground in protecting non-debtor parties to an international reorganization.

The case involved Babcock & Wilcox which filed for bankruptcy protection last year in Louisiana largely as a result of the weight of asbestos litigation. Babcock & Wilcox had an operating subsidiary in Canada ("B&W Canada") which was not filed in the Chapter 11 case. By all accounts, B&W Canada was a solvent entity. Because its parent had sought Chapter 11 protection, however, it might have become subject to creditors' claims in Canada based on alter ego or other comparable theories since it did not have insolvency protection in Canada. The difficulty for B&W Canada in seeking Canadian insolvency protection was that the conventional Bankruptcy and Insolvency Act ("BIA") and the more flexible Companies Creditors' Arrangement Act ("CCAA"), both require a debtor to be insolvent to obtain protection from its creditors. Moreover, local Canadian creditors and, perhaps, even some Canadian courts might not have recognized a stay of proceedings under Chapter 11 if the Canadian company had been included in the Chapter 11 filing (assuming there had been jurisdiction to do so).

The answer lay in the new international insolvency provisions that had been added to Canadian insolvency legislation in 1997. These amendments were the first international insolvency provisions ever introduced into Canadian bankruptcy legislation and, briefly, they allow Canadian courts to co-operate with Bankruptcy Courts in other countries to co-ordinate and harmonize their respective administrations in cross-border cases. The legislative intent behind the new provisions was to allow enterprise value

to be maintained in multinational cases while a reorganizational solution to the financial difficulties of a multinational debtor was negotiated.

A specific provision in the new legislation allows a Canadian court to “make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of [Canadian] proceedings... with any foreign proceedings.” The threshold issue for the Canadian court in *B&W (Canada)* was whether this relief could be made available to a solvent entity which, after all, was itself not eligible to seek insolvency protection under the statute.

The Canadian court concluded that its jurisdiction to assist other courts in international cases was distinct from its jurisdiction to offer protection to a reorganizing insolvent debtor. The Court reasoned, consequently, that it could extend injunctive protection against creditors’ claims to a solvent affiliate of a debtor in a foreign reorganizational proceeding. The Court concluded that B&W Canada was a significant participant in the Babcock & Wilcox corporate group and that there was an interdependence between it and the parent company which merited granting Canadian protection to the subsidiary against proceedings by asbestos claimants. The Court consequently made an interim injunctive order restraining actions by asbestos claimants against B&W Canada. In doing so, the Court took into account a request from the Bankruptcy Court for the assistance of the Canadian courts with the Bankruptcy Court’s administration.

In its decision, the Canadian Court formulated principles to deal with situations in which a Canadian court is asked to co-operate with an administration in another country. This decision is perhaps the broadest statement of principles of this kind in a Canadian international case. The Court concluded, among other things, that:

- Comity and co-operation between Courts in different countries should be encouraged;
- The overall effect of foreign insolvency legislation should be respected unless it is radically different from Canadian insolvency legislation;

- All stakeholders should be treated equitably and, whenever possible, like stakeholders should be treated equally regardless of the jurisdiction in which they reside;
- A reorganizing business should be allowed to reorganize as a global unit especially where there is an established interdependence between units in different countries;
- It may be practical that the Court in the jurisdiction where the principal assets of the business are located should take the lead in a global reorganization although the corollaries of that would be that courts in other jurisdictions should be kept current with information as to developments in the case and that stakeholders in the other jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

In terms of determining which country might have the majority of the debtor's interests, the Court suggested that it would consider at such factors as the location of the debtor's principal operations, the location of its stakeholders, the law in each jurisdiction which would be applicable to the specific problems facing the debtor and the enterprise, the law to be applied in analyzing any undue prejudice and other factors that might be appropriate in particular circumstances.

On the facts of the case, the Canadian Court did not have to contend with domestic Canadian creditors opposing the application for relief on the basis that they were being prejudiced by having their remedies against a solvent Canadian company curtailed in the interests of a foreign insolvency proceeding. It is worth noting that in an earlier Canadian case arising out of the Dow Corning reorganization, the Alberta Court of Queen's Bench was faced with those arguments from local Canadian creditors and nonetheless stayed their proceedings against Dow Corning pending its reorganization under Chapter 11. The decision in *Re Babcock & Wilcox (Canada) Inc.* is perhaps the clearest and most unambiguous statement to date of the extent to which Canadian courts will co-operate with the courts of other countries in cross-border and multinational reorganizations.

(b) Recognition of a Foreign Receiver under Section 304:-

Section 304 of the Bankruptcy Code seems directed toward providing assistance to *bankruptcy* administrations in other countries but a decision in Texas has indicated that it might not be necessary to construe section 304 that narrowly. The applicant for section 304 relief was a receiver that had been appointed over the business of a Canadian debtor by the Alberta Court of Queen's Bench. As with most Canadian provinces, the legislative jurisdiction to appoint a receiver over a business is a matter of provincial, rather than Federal, law and does not involve the Federal Government's bankruptcy jurisdiction. The provincial jurisdiction is founded on statutory provisions that allow the court to appoint a Receiver where, simply, the Court is persuaded that it is "just and convenient" for a receiver to be appointed. The Bankruptcy Court held that, in the circumstances, the Canadian Receiver fell within the definition of a foreign insolvency representative and consequently granted relief under section 304: *Re Fracmaster Ltd.* 237 B.R. 627 (Bankr. E.D. Tex. 1999).

(c) Foreign Representatives in Canadian International Insolvency Practice:-

When Canadian insolvency legislation was amended in 1997 to add provisions dealing with the recognition of foreign insolvency proceedings and foreign insolvency representatives, the amendments maintained the scepticism that is apparent in a number of countries about the *bona fides* of debtors-in-possession. Foreign Courts occasionally have some difficulty in accepting that an entity that appears to be the same organization that it was prior to the filing of a bankruptcy case can thereafter owe fiduciary responsibilities to creditors to whom it has failed to honour its commitments. In that vein, the 1997 Canadian provisions required, essentially, that a foreign representative be a Court-appointed Officer operating under the authority of the foreign Court. The intention seemed to have been to exclude the debtor-in-possession from being its own foreign representative in a Canadian proceeding.

There are some signs that the legislative rigidity of this position may be being softened by its judicial consideration. In a recent case involving a

Chapter 11 filing in Nevada and a companion CCAA filing in Toronto, the Ontario Bankruptcy Court in fact recognized an independent “Responsible Officer” appointed in the Chapter 11 case as fulfilling the requirements for a foreign representative under the international insolvency provisions of the CCAA: *Re Agri Bio Tech Inc.* (Unreported: Ontario Superior Court, May, 2000).

On the other hand, a lower court in Alberta earlier this year refused to recognize the Order made in the *Singer* reorganization in the Southern District of New York appointing foreign representatives and seeking the cooperation of courts and jurisdictions where *Singer* and its subsidiaries carried on business. The Alberta Court, taking the conventional conflict of laws view of issues in international insolvency cases, seems to have avoided the cooperation that usually is exhibited by the Courts of the United States and Canada for each other and concluded that it would not take any steps to restrain Canadian creditors from pursuing their claims against *Singer's* Canadian subsidiary. Apparently, if the Canadian subsidiary needed protection, it could seek protection under Canadian bankruptcy legislation. This decision illustrates that international cooperation in insolvency cases is still not something that can be taken for granted.

(d) Worldwide Ancillary Injunctions Supporting Foreign Reorganizations:-

In two recent instances, Bankruptcy Courts have assisted in Canadian reorganizations involving debtors with operations and assets in the United States. In both cases, the Canadian-based debtor had commenced reorganizational proceedings under the Canadian CCAA. Both debtors, however, had substantial operations (and creditors) in the United States but, for different reasons, were not prepared to commence full Chapter 11 proceedings. The solution that each of them reached independently was to apply to the Bankruptcy Court in the District in which most of their U.S.-based assets were centred for an order in aid of the Canadian reorganizational proceedings to restrain creditors in the United States from taking proceedings against the debtors' U.S. assets. The Bankruptcy Courts in each case presumably considered these applications to be non-

controversial and injunctions were granted in each case to restrain U.S.-based creditors from pursuing their remedies against the debtors' U.S.-based assets. Neither Court, however, issued an opinion in support of its Order. The two cases were *Re Canadian Airlines International Limited* (Bankr. Hawaii: March, 2000) and *Re Euro United Corporation* (Bankr. W.D.N.Y., January, 2000).

(e) A Worldwide Temporary Restraining Order to Protect Foreign Subsidiaries

In what may be an unprecedented Order, the Bankruptcy Court in Delaware in the *Owens-Corning* Reorganization, issued a Temporary Restraining Order directed at a variety of international and domestic financial institutions to restrain them from taking any actions or pursuing any remedies against the debtor's foreign subsidiaries. The TRO was exceptionally broad and restrained the defendant institutions from exercising any enforcement rights or remedies under the applicable Credit Agreement or under any other agreement between the parties or under any other applicable law (with some minor technical exceptions). The scope of the Order is best illustrated by the fact that it is directed against over 50 major international institutions with regard to over 100 Owens-Corning subsidiaries in 20 countries around the world. Owens-Corning filed in October, 2000 and issues relating to this TRO and the injunction sought by the debtor, however, have been continued from time to time and the injunctive relief granted to Owens Corning is still in effect.

9. *Guidelines for Court-to-Court Communications in Cross-Border Cases: The American Law Institute Transnational Insolvency Project*

The American Law Institute is a prestigious organization comprised of senior and respected judges, lawyers and academics but with a strong international component featuring senior lawyers and judges from over 20 countries worldwide. By way of background, the ALI was organized in 1923 following a study by prominent judges, lawyers and academics working as the "Committee on the Establishment of a Permanent

Organization for the Improvement of the Law". The ALI was formed to "promote the clarification and simplification of the law and better its adaptation to social needs [and] to secure the better administration of justice ...".

The ALI has developed authoritative *Restatements* of the Law of Agency, Conflict of Laws, Contracts, Judgments, and Foreign Relations. Other Institute Projects have resulted in the development of model statutory formulations as in the Institute's studies on Evidence, Securities Law and Land Development. With representatives of the governments of the states in the United States, the ALI participated in developing the Uniform Commercial Code which many authorities regard as one of the most important developments in United States commercial law. Part of the current work on revisions to the Uniform Commercial Code includes the development of international annotations to the Code.

The Transnational Insolvency Project began in 1994 and was the ALI's first private international law Project. It was intended to develop cooperative procedures for use in business insolvency cases involving companies with assets or creditors in more than one of the three NAFTA countries. The Project proceeded on the basis that it was unlikely that harmonization of the formal legislation of the three countries would be achieved in the foreseeable future and that prospects of a comprehensive insolvency treaty were slim. The primary thrust of the Project was, therefore, on approaches that could be implemented by the insolvency community and the courts without the need for actual formal legislation.

The Project proceeded in two phases. The first phase produced authoritative summaries of the insolvency law and practice in each of the United States, Canada and Mexico. These survey Statements are intended to be comprehensive but readily understandable by an international audience. Each of these Country Statements constitutes a useful and succinct description and summary of the domestic and international bankruptcy law and practice in each NAFTA country.

The second and more challenging phase of the Project was to develop principles and procedures that would be acceptable to all three NAFTA countries which would lead to harmonization and coordination of

insolvency proceedings in cases that involved more than one of the NAFTA jurisdictions. This phase was completed at the ALI's Annual Meeting in Washington in May, 2000. As with the first phase of the Project, the second phase proceeded under the guidance of country teams that had been assembled by the ALI in the United States, Canada and Mexico consisting of leading insolvency practitioners, judges and academics. The preparation of the *ALI Statement*, consequently, was a rigorous process for the Reporters on the Project, particularly Professor Jay L. Westbrook of the University of Texas at Austin, the Main Reporter for the ALI Project.

One of the most important elements in the second phase of the Project was the preparation of *Guidelines* dealing with the communications that must take place between jurisdictions in order to foster and enhance coordination and harmonization of administrations in cross-border or multinational insolvency cases. The Project consequently produced its *Guidelines Applicable to Court Communications in Cross-Border Cases*. These *Guidelines* were reviewed by the Reporters and advisors in each of the three NAFTA countries and approved by the membership of the American Law Institute at its Annual Meeting. The *Guidelines* are, in fact, largely based on examples from actual cross-border cases involving Cross-Border Insolvency Protocols.

The *Guidelines* recognize that one of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganizational proceedings, it is essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.¹

It is reasonable to expect that many jurisdictions, including most common law jurisdictions, have prohibitions against *ex parte* communications with a Court by one party to a proceeding in the absence of the other party to the proceeding. In some jurisdictions, by contrast, the prohibition may be milder and may not even exist at all. Arrangements for court-to-court

¹ This summary is largely derived from Prof. J.L. Westbrook's very eloquent Introduction to the topic in the ALI's Transnational Insolvency Project *Statement*.

communications in cross-border cases must not promote or condone any contravention of domestic rules, procedures or ethics. The *Guidelines* in fact specifically mandate that local domestic rules, practices and ethics must be fully observed at all times.

The *Guidelines* are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications among courts in cross-border cases, however, is both more important and more sensitive than in domestic cases. The *Guidelines* are intended to encourage such communications and to permit rapid co-operation in a developing insolvency case while ensuring due process to all concerned. The concept of court-to-court communications is better seen as a linking of two concurrent court hearings, all conducted in accordance with proper systems and procedures. The only change from a purely domestic hearing is the technological link to the other Court.

The *Guidelines* were framed initially to contemplate application only between Canada and the United States because of the very different rules governing communications with courts and among courts in Mexico. Nonetheless, particularly after the adoption by Mexico of the UNCITRAL Model Law on Cross-Border Insolvency, a Mexican Court might choose to adopt some or all of the *Guidelines* for communications by a *sindico* with foreign administrators or courts.

The intent behind the *Guidelines* was that a Court intending to employ the *Guidelines*—with or without modifications—should adopt them formally before applying them. A Court might wish to make its adoption of the *Guidelines* contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting court might want to make adoption or continuance conditional upon adoption of the *Guidelines* by the other court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The *Guidelines* are intended to be adopted following the appropriate notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local

procedures, including notice requirements, that are used in urgent or emergency situations would be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the *Guidelines* at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the *Guidelines*.

One of the issues that a communication linkage may raise however, is the issue of whether the participation by a party in one country in arguments or submissions being made in the hearing in the other country constitutes a form of attornment to the jurisdiction of the other Court. The *Guidelines* attempt to anticipate that difficulty by indicating that such participation will not constitute an attornment to the jurisdiction of the other Court unless the party who participates in the hearing in the other Court is actually seeking relief from that Court. This is consistent with Article 10 of the UNICITRAL Model Law which indicates that an application by a foreign representative does not subject the foreign representative or the foreign assets or the affairs of the debtor to the jurisdiction of the domestic Court for any purpose other than the actual application.

In actual practice in cases involving cross-border hearings, the Court orders that are made to permit these type of hearings almost always indicate that any informal participation in the proceedings in the Court in the other country do not constitute an attornment by the party to the jurisdiction of that Court. It is also the case, moreover, that a party in one jurisdiction would have to be represented by counsel admitted to the bar of the other jurisdiction in order to even receive an audience from that Court. In practice, therefore, a properly prepared joint court hearing need not unnecessarily or unexpectedly expose a party in one country to the risk of an attornment of the Courts of the other.

The *Guidelines* are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are intended to apply only in a manner that is

consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the *Guidelines* represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is likely to be advantageous to all of the stakeholders involved in a cross-border or multinational reorganization or bankruptcy case.

In a recent precedent-setting ruling, the *Guidelines for Court-to-Court Communications in Cross-Border Cases* from the Transnational Insolvency Project were adopted and approved in a cross-border case between Canada and the United States.

The case, *Re Matlack Systems Inc.*, involved a former NYSE-listed transportation company that had filed under Chapter 11 in Delaware. The company had Canadian operations which it carried on directly (as contrasted with carrying on business through subsidiaries incorporated in Canada).

Local Canadian creditors (i.e., those not having a presence in the United States) were not subject to the automatic stay created in the Chapter 11 case. There was considerable potential for Canadian creditors in this category to take action and to effect attachments that would have had a highly negative effect on the company's attempts to carry on its business in the normal course and a creditor seizure of corporate assets had in fact been carried out.

The company, consequently, resorted to the international insolvency provisions of the Canadian *Companies' Creditors Arrangement Act* ("CCAA") which allow Canadian courts to assist with reorganizations and insolvencies in other jurisdictions. On an application by the company, Mr. Justice Farley granted a stay of proceedings against Canadian creditors in aid of the Chapter 11 proceedings in Delaware. Mr. Justice Farley also approved, from the Canadian side, a Cross-Border Insolvency Protocol to co-ordinate the insolvency administrations in the two countries. The novel feature about the Protocol is that it specifically incorporated the *ALI*

Guidelines and Mr. Justice Farley took the opportunity to provide his approval for the *Guidelines* as well from the Canadian side.

In accordance with the procedural suggestions contained in the *ALI Transnational Insolvency Statement*, the *Guidelines* were approved by the Canadian Court on the basis that they would not be effective until they were approved from the U.S. side by the Bankruptcy Court in Delaware (Hon. Mary F. Walrath). The Delaware Bankruptcy Court subsequently approved the Protocol and the *Guidelines* from the U.S. side and, consequently, the *Guidelines* are now formally in place for the first time in a cross-border case. See *Re Matlack Inc.* (Unreported: Ontario Superior Court of Justice: Case No. 01-CL-4109, April 19, 2001) and *Re Matlack Systems Inc.* (United States Bankruptcy Court for the District of Delaware (Hon. Mary F. Walrath), Case No. 01-01114 (MFW), May 24, 2001).

The *Guidelines for Court-to-Court Communications in Cross-Border Cases* are attached as Appendix 5 to this paper. The full texts of the Summary Reports on United States, Mexican and Canadian insolvency law and practice together with the *Principles of Co-operation in Transnational Insolvency Cases* can be ordered from the American Law Institute. Ordering information can be found on the ALI's website at www.ali.org. (The author was the Chair for Canada on the American Law Institute Transnational Insolvency Project and was the Project Reporter for Domestic Aspects of Canadian Insolvency Law.)

10. Enhancing Communications and Preserving Stakeholder Value

The development of communications between courts that are dealing with different portions of the same global business has, unfortunately, not kept pace at all with the globalization of business generally. Prior to the onset of globalization, there might well have been no appreciable need for courts to communicate with each other because they were relatively few instances of reorganizations or restructurings that involved more than one jurisdiction.

When, however, the enormous globalization of business and commerce that has occurred over the last 15 to 20 years is combined with the widespread movement toward insolvency systems that promote

reorganizations and rehabilitations rather than liquidations, the need to coordinate administrations in different countries that are dealing with portions of a single, integrated global business becomes almost unanswerable if stakeholder values are to be preserved and protected.

In conventional circumstances in which the courts cannot or do not communicate effectively either directly or through properly-authorized court officers or properly-constituted insolvency representatives, communications between courts involve processes and procedures that are time-consuming to the point of being virtually irrelevant to the prospects for saving a reorganizing business. Such traditional means of communication as Letters Rogatory or Letters of Request from one court to another involve time frames that can easily doom a delicate international reorganization to failure. The time that might elapse in these kinds of traditional approaches to cross-border communication is enormous in relation to the need for quick action and expedient solutions to cross-border problems.

Consider the traditional route of one court communicating with another court in a multinational case. In the first court, an application is brought on proper notice to the proper parties for certain relief which, for example, could include a request for Letters of Assistance or Letters Rogatory directed to the other court. After notice and a hearing and after any preliminary matters have been disposed of, the court will, where appropriate, issue its Order of Request or Letters Rogatory directed to the other court. After a suitable time for the administrative staff at the court to engross and place the appropriate seals and ribbons on the document, the document will be physically delivered to counsel in the other jurisdiction. At that point, that counsel will engage on a further application before the other court upon proper notice and in accordance with proper procedures for an order of the receiving court recognizing and giving directions, if appropriate, to implement the request of the first court. By this point in a complicated fast-moving business reorganization, there is a substantial risk that events will have overtaken the reorganizing business before the courts have an opportunity to consider, let alone deal with or resolve, the issues that must be addressed in order save the business. In other words the operation may be successful but the patient may die.

The tremendous advances that have been made in technology and communications over the past 15 years do not seem to be readily embraced by a number of court systems. Changes can be made that can utilize current technology and communication facilities without in any way detracting from the propriety of proceedings before the courts. Many courts now have web sites on the internet. To see a document that has been filed in a proceeding in one of those courts, all that is needed is simply a computer and proper access. A verifiably authentic court document from another country can be printed in the local Court from a source on the internet. Producing a certified original copy of a document with the appropriate formality from the originating Court will usually not be strictly necessary or, if it is, such a document can be produced after the fact.

Furthermore, many countries' legislation is now available on the internet. It may not be necessary that a lawyer qualified in another jurisdiction present himself in the foreign court to give evidence that the printed text of the legislation he has with him is in fact legislation that is validly in force in the other country. A computer and an internet address for an officially-created or sanctioned source for domestic legislation will suffice in a wide variety of circumstances. The *Guidelines* attempt to address these and other issues to facilitate communications between courts, all in accordance with proper domestic law and procedures but taking advantage of currently-available technology to be able to make decisions in real time that will enhance the prospects of a reorganizing business being able to undergo a successful restructuring or reorganization.

It is difficult to see how implementing the use of modern technology to facilitate communications between courts can prejudice the interests of stakeholders of the business or the reorganizing business itself. In the view of many experienced insolvency practitioners, it is time for the courts to avail themselves of the technological improvements that society has produced in the interest of achieving fair and proper dispositions of issues that arise in cross-border cases in the interest of avoiding the cost and consequence of procedures and processes that prevent decisions from being made on a basis that is timely and relevant to the survival of reorganizing business.

The increased use of Cross-Border Insolvency Protocols (which often feature provisions for Court-to-Court communications) and their acceptance by the courts is a very positive development for stakeholders involved in multinational businesses in financial difficulty. Under traditional approaches, similar attempts at multinational reorganizations might have simply disintegrated as a result of creditors and courts in different countries attempting to seize the high ground and take jurisdiction over an entire case (or at least over all the assets) regardless of the creditors and the courts in another jurisdiction. Cross-border insolvency filings these days, however, are being characterized by an increasing level of respect and cooperation between the Courts in different countries and this trend shows no signs of abating.

11. Conclusion

Although it is always unwise to generalize, it would seem that the courts in the major trading countries, taken as a whole, are demonstrating an increased willingness to co-operate with each other and to co-ordinate activities to secure commercially-oriented results in international restructurings and insolvencies. The Protocols that were approved in the *Philip Services*, *Loewen*, *Livent*, *Everfresh*, *Maxwell Communication*, *Olympia & York* and *Nakash* insolvencies are fine examples of international co-operation between courts, and they are examples that will, almost certainly, be built upon by the courts in future multinational insolvencies.

The courts, consequently, seem more and more prepared to work toward a framework that encourages co-ordination and co-operation between jurisdictions in multinational cases. They simply need the active and innovative participation of the insolvency community to create structures that are conducive to increasing cross-border co-ordination in multinational cases. Occasionally, on the other hand, there are examples of particular courts overlooking trends in international co-ordination with orders that show that the trend toward greater international co-operation should not be taken for granted.

Recent experience with international workouts and insolvencies shows, however, that the courts and the insolvency community can achieve

considerable progress without the need for legislative action. The examples of co-operation in recent international cases show that, even in the absence of treaty arrangements between countries, a kind of international insolvency custom of co-operation may be developing. With the continuing support of the insolvency community and the judiciary in insolvency cases, the insolvency community can quite confidently expect significant continuing progress in the area for the benefit and advantage of international commerce and everyone affected by it.

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May 25, 2001

INTERNATIONAL INSOLVENCY INSTITUTE

International Insolvency in the New Millennium

Co-ordinating Cross-Border Insolvency Cases

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Appendix 1

INTERNATIONAL BAR ASSOCIATION

SECTION ON BUSINESS LAW

COMMITTEE J - INSOLVENCY AND CREDITORS' RIGHTS

Committee J *Cross-Border Insolvency Concordat*

**Adopted by the Council of the Section on Business Law
of the International Bar Association**

Paris, France
September 17, 1995

**Adopted by the Council
of the International
Bar Association**

Madrid, Spain
May 31, 1996

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Cross-Border Insolvency Concordat

INTRODUCTION TO THE CROSS-BORDER INSOLVENCY CONCORDAT

Committee J of the International Bar Association is pleased and proud to have sponsored the development of the Cross-Border Insolvency Concordat. The Concordat is one of the most significant initiatives in international insolvency and reorganizations in many years.

Our Committee is highly appreciative of the work that so many Members of our Committee have put into the analysis and development of the concepts that form the basis of the Concordat. Under the Co-Chairs of our Subcommittee on the Cross-Border Insolvency Concordat, Mike Sigal of New York and Christoph Staubli of Zurich, Country Teams were organized in over twenty countries from all around the world. Through presentations at Committee J Conferences and Meetings, several hundred members of our Committee have been able to participate in the deliberations on the Concordat. The Committee also acknowledges a deep debt of gratitude to several distinguished international jurists who participated in the development and, more latterly, in the actual application of the Concordat to an existing cross-border reorganization between two of Committee J's member countries.

The Concordat is intended to an evolving work that will be altered and modified to reflect the experiences that members of the international insolvency community gain from working with its concepts and applying it in practice. We are aware of the benefits to be derived from the application of the principles of the Concordat within the work of the United Nations Commission on International Trade Law (UNCITRAL) prospective Model Law on Cross-Border Insolvency. We are also considering provisions based on the Concordat model that would be suitable for application in the case of cross-border insolvencies involving financial institutions and the potential development and use of the Concordat for model provisions in commercial documentation in international transactions.

Committee J welcomes comments and suggestions on the provisions of the Cross-Border Insolvency Concordat and on measures that could be used to increase the effectiveness of the Concordat in meeting our Committee's goals of achieving increased levels of co-ordination and harmonization among Committee J's member countries in cross-border and multinational insolvencies and reorganizations.

Madrid, Spain
May 31, 1996

E. Bruce Leonard
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Chairman, Committee J

INTRODUCTION TO THE COMMITTEE J CROSS-BORDER INSOLVENCY CONCORDAT

Flexibility in the rules appears to be indispensable in international bankruptcy. The situations which arise are so varied that any one rigid rule cannot solve all of them satisfactorily. ... Neither the theory of territoriality nor the theory of ubiquity can cope adequately with the divergent situations.

Professor Kurt H. Nadelmann²

The Cross-Border Insolvency Concordat is a framework for harmonizing cross-border insolvency proceedings. There exists today no uniform statute or treaty adopted by commercial nations dealing with the policy and commercial problems that arise in cross-border insolvencies. Yet cross-border insolvencies are increasing both in number and size, as well as in complexity. The Concordat attempts to aid in filling this gap in international law.

International commerce will be encouraged if the insolvency bench and bar develop a set of general guidelines, a "concordat", which may be used in developing solutions to individual cross-border insolvencies. The purpose of the Concordat is to suggest generalized principles, which the participants or courts could tailor to fit the particular circumstances and then adopt as a practical approach toward dealing with the process.

To be supportive of international commerce, any insolvency regime must be reasonably predictable, fair and convenient. Supporting international commerce is a worthy goal, because, as some have noted, countries which trade together rarely make war upon one another. International commerce will be furthered by an understanding in the international business community that general principles exist which, in the event of business crisis, are recognized as an underpinning to harmonize insolvency proceedings.

These principles should reflect respect for the legitimate private expectations of the parties transacting business with the debtor, including their reasonable reliance upon laws of particular jurisdictions. However, legislation reflecting a particular jurisdiction's policies regarding such matters as priorities among claims must be given due weight where jurisdictionally appropriate, as should regulatory laws governing businesses such as banking or insurance.

The Concordat has been prepared to provide a framework of general principles for addressing cross-border insolvencies. The Concordat deals with some of the important conceptual issues that arise in cross-border insolvencies. Some principles have been framed in the alternative, reflecting among other things extensive comment from many countries.

² *Solomons v. Ross and International Bankruptcy Law* 9 Mod. L.R. 154, 167 - 168 (1946).

It is important to note what the Concordat is not. The Concordat is not intended to be used as, or as a substitute for, a treaty or statute. The Concordat is not a rigid set of rules; indeed, it is expected to change as it is used. Rather, the Concordat is an interim measure until treaties and/or statutes are adopted by commercial nations. It is intended, in the absence of an applicable treaty or statute, to guide practitioners in harmonizing cross-border insolvencies. The Concordat, as modified by counsel to fit the circumstances of any particular cross-border insolvency, could be implemented by court orders or formal agreements between official representatives or informal arrangements, depending upon the rules and practices of the particular forum involved.

COMMITTEE J CROSS-BORDER INSOLVENCY CONCORDAT PRINCIPLE 1

IF AN ENTITY OR INDIVIDUAL WITH CROSS-BORDER CONNECTIONS IS THE SUBJECT OF AN INSOLVENCY PROCEEDING, A SINGLE ADMINISTRATIVE FORUM SHOULD HAVE PRIMARY RESPONSIBILITY FOR COORDINATING ALL INSOLVENCY PROCEEDINGS RELATING TO SUCH ENTITY OR INDIVIDUAL.

Commentary: In most cases, an enterprise will have its nerve center and many of its assets in one country. In the usual circumstance that country is the most appropriate forum for the administrative center of its insolvency. Having a primary administrative forum presents the possibility of many benefits enhancing control of assets, increasing business values, and ensuring fair treatment of creditors. Predictability of the “natural” administrative forum will also be most supportive of international commerce.

The Concordat is designed to provide principles useful where any of several procedural situations occurs. While in most cases the establishment of a single main proceeding will be the best way to achieve the common goals of most national insolvency regimes, there may well be circumstances in which more than one plenary case is maintained. For example, plenary proceedings might proceed in two jurisdictions, with or without an administrative protocol, and with or without limited proceedings in yet other jurisdictions. In all of these circumstances the Concordat provides principles intended to assist in coordination. The Concordat also provides principles applicable in any forum whether one, or several, plenary or limited proceedings are pending. These include the analysis of appropriate choice of law in litigated matters such as claim resolution and voiding rules.

PRINCIPLE 2

WHERE THERE IS ONE MAIN FORUM:

- (A) ADMINISTRATION AND COLLECTION OF ASSETS SHOULD BE COORDINATED BY THE MAIN FORUM.

- (B) AFTER PAYMENT OF SECURED CLAIMS AND PRIVILEGED CLAIMS, AS DETERMINED BY LOCAL LAW, ASSETS IN ANY FORUM OTHER THAN IN THE MAIN FORUM SHALL BE TURNED OVER TO THE MAIN FORUM FOR DISTRIBUTION.
- (C) COMMON CLAIMS ARE FILED IN AND DISTRIBUTIONS ARE MADE BY THE MAIN FORUM. COMMON CREDITORS NOT IN THE MAIN FORUM MUST FILE CLAIMS IN THE MAIN FORUM BUT (TO THE EXTENT ALLOWABLE UNDER THE PROCEDURAL RULES OF THE MAIN FORUM) MAY FILE BY MAIL, IN THEIR LOCAL LANGUAGE AND WITH NO FORMALITIES OTHER THAN REQUIRED UNDER THEIR LOCAL INSOLVENCY LAW.
- (D) THE MAIN FORUM MAY NOT DISCRIMINATE AGAINST NON-LOCAL CREDITORS.
- (E) FILING A CLAIM IN THE MAIN FORUM DOES NOT SUBJECT A CREDITOR TO JURISDICTION FOR ANY PURPOSE, EXCEPT FOR CLAIMS ADMINISTRATION SUBJECT TO THE LIMITATIONS OF PRINCIPLE 8 AND EXCEPT FOR ANY OFFSET (UNDER VOIDING RULES OR OTHERWISE) UP TO THE AMOUNT OF THE CREDITOR'S CLAIM).
- (F) A DISCHARGE GRANTED BY THE MAIN FORUM SHOULD BE RECOGNIZED IN ANY FORUM.

Commentary: International commerce is encouraged to the extent that participants may rely upon the expectation that if they engage in transactions with a multinational enterprise, and an insolvency proceeding is commenced in any nation with which the enterprise has a connection, that participant will not suffer discriminatory treatment based solely upon nationality or domicile. While a creditor may be subject to the inconvenience of an insolvency proceeding in another country, that risk is part of engaging in business with a multinational enterprise. But the risk of discriminatory treatment should not be a business. Nor should the risk that the creditor's preinsolvency claim will be unanticipated jurisdiction, unilaterally chosen by the entity or individual commencing insolvency proceedings, be a risk of doing such business.

To promote economy, and in light of modern communications technology, the main forum should have the ability to serve process worldwide, but a defendant should be permitted to object to jurisdiction of the main forum without submitting to jurisdiction, and to raise other objections to the forum. Similarly, the filing of a claim in a particular jurisdiction subjects the creditor to insolvency jurisdiction, but only as exercised by the court ultimately found appropriate to hear a matter, which may not be the main forum, and only with respect to its claim and offsets.

PRINCIPLE 3

- A. IF THERE IS MORE THAN ONE FORUM, THE OFFICIAL REPRESENTATIVES APPOINTED BY EACH FORUM SHALL RECEIVE NOTICE, AND HAVE THE RIGHT TO APPEAR IN, ALL PROCEEDINGS IN ANY FORA. IF REQUIRED IN A PARTICULAR FORUM, AN EXEQUATUR OR SIMILAR PROCEEDING MAY BE UTILIZED TO IMPLEMENT RECOGNITION OF THE OFFICIAL REPRESENTATIVE. AN OFFICIAL REPRESENTATIVE SHALL BE SUBJECT TO JURISDICTION IN ALL FORA FOR ANY MATTER RELATED TO THE INSOLVENCY PROCEEDINGS, BUT APPEARING IN A FORUM SHALL NOT SUBJECT HIM/HER TO JURISDICTION FOR ANY OTHER PURPOSE IN THE FORUM STATE.
- B. TO THE EXTENT PERMITTED BY THE PROCEDURAL RULES OF A FORUM, EX PARTE AND INTERIM ORDERS SHALL PERMIT CREDITORS OF ANOTHER JURISDICTION AND OFFICIAL REPRESENTATIVES APPOINTED BY ANOTHER JURISDICTION THE RIGHT, FOR A REASONABLE PERIOD OF TIME, TO REQUEST THE COURT TO RECONSIDER THE ISSUES COVERED BY SUCH ORDERS.
- C. ALL CREDITORS SHOULD HAVE THE RIGHT TO APPEAR IN ANY FORUM TO THE SAME EXTENT AS CREDITORS OF THE FORUM STATE, REGARDLESS OF WHETHER THEY HAVE FILED CLAIMS IN THAT PARTICULAR FORUM, WITHOUT SUBJECTING THEMSELVES TO JURISDICTION IN THAT FORUM (INCLUDING WITH RESPECT TO RECOVERY AGAINST A CREDITOR UNDER VOIDING RULES OR OTHERWISE IN EXCESS OF A CREDITOR'S CLAIM).
- D. INFORMATION PUBLICLY AVAILABLE IN ANY FORUM SHALL BE PUBLICLY AVAILABLE IN ALL FORA. TO THE EXTENT PERMITTED, NON-PUBLIC INFORMATION AVAILABLE TO AN OFFICIAL REPRESENTATIVE SHALL BE SHARED WITH OTHER OFFICIAL REPRESENTATIVES.

Commentary: If more than one plenary forum is presiding over insolvency proceedings of a multinational entity or individual, coordination of both the administration and claims processing is essential. The goals of Principle 1 are still important, and they can be achieved only if the Official Representatives are in constant communication, work together to coordinate the process, and have the respect of all relevant jurisdictions. All should be aware of proceedings in all courts, and where necessary should be heard if judicial resolution of a matter is required.³

³ Official Representatives will most often seek to appear to press claims of the creditors in their country or to assert an interest in assets. However, Official Representatives should be heard on any matter of interest to their position.

Where more than one plenary forum exists, it appears to be an equitable corollary that any Official Representatives should be subject to plenary jurisdiction in every such forum. If creditors must respond in that forum, the Official Representatives must surely be required to respond in that forum. However, the Official Representatives should not be subject to jurisdiction for any purpose unrelated to representation of the estate.

Interim orders must often be made on short notice, especially in the first stages of insolvency proceedings. Because of the greater complexity of cross-border proceedings, such orders should be made subject to “come-back” procedures, so that any affected party may request the court to reconsider the matter when the situation has stabilized and the facts are clearer. In that way, courts will be given sufficient time and sufficient input to consider carefully the consequences of orders having cross-border ramifications. In addition, parties who are uncertain of the court's intentions regarding the cross-border reach of their orders, and who are not otherwise subject to the jurisdiction of the court, should be free to obtain clarification of such issues without being subjected to jurisdiction for other purposes.

Because the guiding principle of this Concordat is that all common creditors should be treated as creditors of a single world-wide estate, even though the estate is administered by more than one forum, as a matter of fairness all creditors should have a right to be heard (where a forum permits creditors to speak) on administrative matters in which they have an interest without submission to jurisdiction of the administrative forum for any purpose other than administrative matters and claims administration. No creditor not otherwise found in the administrative forum state, or whose claim is not connected to the forum state, should, as a result of administrative participation, lose its rights to jurisdictional and other international law arguments with respect to an adversary proceeding against the creditor.

PRINCIPLE 4

WHERE THERE IS MORE THAN ONE PLENARY FORUM AND THERE IS NO MAIN FORUM:

- (A) EACH FORUM SHOULD COORDINATE WITH EACH OTHER, SUBJECT IN APPROPRIATE CASES TO A GOVERNANCE PROTOCOL.
- (B) EACH FORUM SHOULD ADMINISTER THE ASSETS WITHIN ITS JURISDICTION, SUBJECT TO PRINCIPLE 4(F).
- (C) A CLAIM SHOULD BE FILED IN ONE, AND ONLY ONE, PLENARY FORUM, AT THE ELECTION OF THE HOLDER OF THE CLAIM. IF A CLAIM IS FILED IN MORE THAN ONE PLENARY FORUM, DISTRIBUTION MUST BE ADJUSTED SO THAT RECOVERY IS NOT GREATER THAN IF THE CLAIM WERE FILED IN ONLY ONE FORUM.

- (D) EACH PLENARY FORUM SHOULD APPLY ITS OWN RANKING RULES FOR CLASSIFICATION OF AND DISTRIBUTION TO SECURED AND PRIVILEGED CLAIMS.
- (E) CLASSIFICATION OF COMMON CLAIMS SHOULD BE COORDINATED AMONG PLENARY FORA. DISTRIBUTIONS TO COMMON CLAIMS SHOULD BE PRO-RATA REGARDLESS OF THE FORUM FROM WHICH A CLAIM RECEIVES A DISTRIBUTION.
- (F) ESTATE PROPERTY SHOULD BE ALLOCATED (AFTER PAYMENT OF SECURED AND PRIVILEGED CLAIMS) AMONG, OR DISTRIBUTIONS SHOULD BE MADE BY, PLENARY FORA BASED UPON A PRO - RATA WEIGHING OF CLAIMS FILED IN EACH FORUM. PROCEEDS OF VOIDING RULES NOT AVAILABLE IN EVERY PLENARY FORUM SHOULD BE:
- ALTERNATIVE A: ALLOCATED PRO - RATA AMONG ALL PLENARY FORA FOR DISTRIBUTION.
- ALTERNATIVE B: ALLOCATED FOR DISTRIBUTION BY THE FORUM WHICH ORDERED VOIDING.
- (G) IF THE ESTATE IS SUBJECT TO LOCAL REGULATION THAT INVOLVES AN IMPORTANT PUBLIC POLICY (SUCH AS A BANKING OR INSURANCE BUSINESS), LOCAL ASSETS SHOULD BE USED FIRST TO SATISFY LOCAL CREDITORS THAT ARE PROTECTED BY THAT REGULATORY SCHEME (SUCH AS BANK DEPOSITORS AND INSURANCE POLICY HOLDERS) TO THE EXTENT PROVIDED BY THAT REGULATORY SCHEME.

Commentary: As suggested with respect to Principle 1, estate assets and business values are more likely to be preserved and enhanced if administration is centered in a single forum. If there are multiple insolvency proceedings and no main forum and if assets are located in several plenary fore or outside of any plenary forum, the same objectives may be met if the relevant fore agree upon a governance protocol.

Where more than one plenary proceeding exists, creditors should have the ability to choose the forum most advantageous or convenient for the creditor. If all creditors have the choice, all are provided equal treatment. Therefore, the holder of a claim should be permitted to file it in any plenary forum.

The choice of law applicable to the underlying validity of the claim is not affected by the choice of where it is filed -- under this Concordat the same choice of law rules will apply in every forum. However, the creditor may feel that one forum is more hospitable than another, and a privileged creditor may fare better under one distribution system rather than another.

Privileged claims, which reflect national policy choices, should be recognized by permitting distributions to those claims in each forum to be made according to its rules. Where a particular country has no assets for distribution and allocated a portion of estate assets for distribution to privileged creditors, the country may distribute such assets to privileged creditors first.

Certain industries, such as banking and insurance, involve regulation that implements important public policies. Under the Concordat, these are respected.⁴

To promote fairness, which in turn promotes commerce, distribution of estate assets, domestic or multinational, should generally be made pro-rata among creditors of the same class, wherever located. However, where more than one plenary forum has been found appropriate, each should be permitted to make distributions pursuant to its own procedural law. Therefore, each must be allocated an appropriate portion of estate property.

Estate property should be allocated (after satisfaction of secured claims and payment of privileged claims in any jurisdiction in which estate property is located) such that it is distributed on a pro-rata basis among plenary fore based upon claims filed. Claims in comparable classes in each jurisdiction should be valued on a comparative basis, and then the assets, or their proceeds, should be allocated among each jurisdiction based upon claims filed.

PRINCIPLE 5

A LIMITED PROCEEDING SHALL, AFTER PAYING SECURED AND PRIVILEGED CLAIMS, AS DETERMINED BY LOCAL LAW, TRANSFER ANY SURPLUS TO THE MAIN FORUM OR ANOTHER APPROPRIATE PLENARY FORUM.

Commentary: In many situations, it may be useful, where a plenary insolvency proceeding is pending on one jurisdiction, to commence a proceeding in another jurisdiction to serve limited objectives, such as collection of assets, where there is no need for a second comprehensive proceeding. In some countries there exist defined statutory vehicles for limited proceedings, such as “secondary proceedings” recognized in the Council of Europe Convention and the draft EU Convention and “ancillary proceedings” in the United States. In many countries, the only available vehicle is a plenary proceeding. However, it appears that in most countries a plenary proceeding may be tailored by the presiding judge to effect limited objectives. The Concordat favors the exercise of discretion, where available, to limit proceedings. This will avoid

⁴ See, *In re Norske Lloyd Ins. Co.*, 242 N.Y. 148 (1926); *In re Ocana*, 151 B.R. 670 (S.D.N.Y. 1993); see also, Art. 1(1) of the Council of Europe Convention and Art. 1(2) of the draft EU Convention.

conflict with plenary proceedings in other jurisdictions and will reduce the cost of cross-border cases.

In any limited proceeding, the court should make every effort to coordinate with courts presiding over plenary proceedings. However, the court in a limited proceeding has authority to collect assets in its jurisdiction, and distribute such assets to secured and privileged creditors. To effect the equality goal of the Concordat and most insolvency regimes, the Concordat provides that surplus assets or proceeds should then be transferred to an appropriate plenary proceeding which handles distribution to common claims.

PRINCIPLE 6

SUBJECT TO PRINCIPLE 8, THE OFFICIAL REPRESENTATIVES MAY EMPLOY THE ADMINISTRATIVE RULES OF ANY PLENARY FORUM IN WHICH AN INSOLVENCY PROCEEDING IS PENDING, EVEN THOUGH SIMILAR RULES ARE NOT AVAILABLE IN THE FORUM APPOINTING THE OFFICIAL REPRESENTATIVE.

Commentary: Where it is found appropriate that administrative supervision of a cross-border insolvency be exercised in more than one country, it should also be appropriate that administrative rules applicable in a particular forum be available for use by the Official Representative to enhance the assets of the estate. For example, if the entity in insolvency proceedings is a party to executory contracts in a nation whose insolvency law permits rejection of executory contracts that are burdensome, the Official Representative should be enabled to use such procedures for the benefit of all creditors. Thus, an Official Representative appointed in Country A could, subject to Principle 8, use a rejection power available in Country B (the main forum) even if Country A's laws provide no such power. Where appropriate, an exequatur or similar proceeding would be used in Country B.

However, the Official Representative is not permitted to use such rules in an unexpected manner. If the pre-insolvency entity was a party to executory contracts to be performed in a country in which rejection is not permissible, the rejection procedure of another country may not be used. Again, international commerce is hindered if parties entering into contracts with multinational entities are concerned that unexpected unilateral use by such entities of favorable law will occur in the event of insolvency. Application of principles of international law may determine whether use of administrative procedures is appropriate.

PRINCIPLE 7

SUBJECT TO PRINCIPLE 8, THE OFFICIAL REPRESENTATIVES MAY EXERCISE VOIDING RULES OF ANY FORUM.

Commentary: Many nations provide rules for negating transactions which occur within a defined period before the onset of insolvency proceedings. The purpose of these laws is usually to prevent the preference by the pre-insolvency entity of some creditors over others, or to prevent the overpayment of some creditors caused by exchanges for unequal value, so creditors not so preferred are treated equally by having all claims considered based on facts existing at the filing date (or as they should have existed a. of that date had the voidable transactions not occurred).

The Official Representative should be permitted to use any provisions available to it to maximize recoveries, provided the use of such remedy is consistent with principles of international law.⁵

PRINCIPLE 8

- A. EACH FORUM SHOULD DECIDE THE VALUE AND ALLOWABILITY OF CLAIMS FILED BEFORE IT USING A CHOICE OF LAW ANALYSIS BASED UPON PRINCIPLES OF INTERNATIONAL LAW. A CREDITOR'S RIGHTS TO COLLATERAL AND SET-OFF SHOULD ALSO BE DETERMINED UNDER PRINCIPLES OF INTERNATIONAL LAW.
 - B. PARTIES ARE NOT SUBJECT TO A FORUM'S SUBSTANTIVE RULES UNLESS UNDER APPLICABLE PRINCIPLES OF INTERNATIONAL LAW SUCH PARTIES WOULD BE SUBJECT TO THE FORUM'S SUBSTANTIVE LAWS IN A LAWSUIT ON THE SAME TRANSACTION IN A NON-INSOLVENCY PROCEEDING. THE SUBSTANTIVE AND VOIDING LAWS OF THE FORUM HAVE NO GREATER APPLICABILITY THAN THE LAWS OF ANY OTHER NATION.
 - C. EVEN IF THE PARTIES ARE SUBJECT TO THE JURISDICTION OF THE PLENARY FORUM, THE PLENARY FORUM'S VOIDING RULES DO NOT APPLY TO TRANSACTIONS THAT HAVE NO SIGNIFICANT RELATIONSHIP WITH THE PLENARY FORUM.
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⁵ Some jurisdictions and the draft EU Convention are not as flexible in that they require the voiding rules of the law of the State in which proceedings are opened to apply. The Concordat considers this approach overly narrow, but is cognizant of this approach.

Commentary: A multinational corporation or corporate group may have transactions in many countries with citizens or domiciliaries of many other countries, involving assets or debt in many countries. The parties to these transactions will have reasonable expectations with respect to the law applicable to such transactions.

When such an enterprise fails, the established rules of international law should apply to claims, collateral, set-off rights, and lawsuits among the participants in the insolvency proceeding. Thus, substantive laws applicable to claims resolution and to lawsuits must be decided based upon on the relevant facts. So should issues of jurisdiction and venue. While the interests of creditors are relevant, those interests are served by the application of laws providing for procedural fairness, not by the application of substantive laws or voiding rules on an unexpected basis.

If there is a main forum, it will usually be an appropriate forum for litigation if it applies international law principles, particularly choice of law principles, to any adversarial litigation pending before it.⁶ The issue could be by more complex where there are multiple administrative fore. In each case, an evaluation must be made based upon the applicable principles of international law, including giving due consideration to relevant insolvency law, as to what law should apply.

Voiding rules raise special issues. Such laws invalidate an otherwise legal transaction. Thus, a forum should have a clear interest in order for its voiding rules to apply. This is consistent with the overall principle that international commerce will be supported if otherwise valid commercial transactions are not disturbed unless a jurisdiction has a clear interest in doing so.

PRINCIPLE 9

A COMPOSITION IS NOT BARRED BECAUSE NOT ALL PLENARY FORA HAVE LAWS WHICH PROVIDE FOR A COMPOSITION AS OPPOSED TO A LIQUIDATION, OR A COMPOSITION CANNOT BE ACCOMPLISHED IN ALL PLENARY FORA, AS LONG AS THE COMPOSITION CAN BE EFFECTED IN A NON-DISCRIMINATORY MANNER.

⁶ The parties may not alone determine the substantive law applicable to a transaction. For example, if payments alleged to be fraudulent conveyances were made in connection with a contract governed by Singaporean law, the determination whether the payments are voidable is not necessarily made under Singaporean law. The appropriate law for evaluating voidability depends upon an analysis of all the circumstances of the payments, including the designation of Singaporean law in the contract, which may be relevant to the parties' expectations and intent. Where, as a result of the insolvency, the laws of another country may be relevant despite the intent of the parties, the basis for its application should also be examined.

Commentary: Not all nations have insolvency laws which provide for a composition. The policy decision whether to permit a composition is based upon a socio-economic view as to whether society benefits from maintaining the debtor as an on-going enterprise rather than liquidating it. The rules that govern the requirements to be satisfied in order to achieve a composition will differ from nation to nation and, thus, it is possible that a composition would be achievable in some, but not all, administrative fora.

In such an instance, if it appears that a composition is in the interests of the creditors, or other constituencies, such as employees or regulatory authorities, of countries which permit a composition, it is essential that the Official Representatives and courts coordinate their actions so that the objectives of all relevant nations may, to the extent possible, be realized. There appears to be no bar to a composition where creditors in any forum in which a vote is permitted in fact vote by the requisite majority of that forum in favor of the composition.

PRINCIPLE 10

TO THE EXTENT PERMITTED BY THE SUBSTANTIVE LAW OF A FORUM, COURTS OF THAT FORUM WILL NOT GIVE EFFECT TO ACTS OF STATE OF ANOTHER JURISDICTION USED TO INVALIDATE OTHERWISE VALID PRE-INSOLVENCY TRANSACTIONS.

Commentary: Insolvency laws are designed to protect the integrity of commerce. They do so by allocating the assets of a failed enterprise in a manner which attempts to weight claims arising from different-non-insolvency law bases in an equitable manner. While preferences and priorities reflecting a particular nation's political decisions are also part of many insolvency statutes, these are usually quite limited and are known in advance to the participants in commercial activity relating to that nation.

The reasonable commercial expectation of the parties should not be upset by ad hoc intervention, post-insolvency, of the executive of a nation by use of any act of state. For example, the pre-insolvency obligations of a private entity should not be invalidated by sovereign cuts after the onset of insolvency proceedings.

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GLOSSARY OF TERMS

This Glossary of Terms is included for convenience and does not have independent significance. These terms may be tailored to conform to the applicable

terms of those jurisdictions involved in any particular cross-border insolvency in which the Concordat is utilized.

Administrative Rules. The rules of insolvency law, excluding voiding rules, governing the conduct of a plenary proceeding.

Common Claim. A claim which is neither a secured claim nor a privileged claim.

Composition. A proceeding with the goal of rehabilitating the business of the entity or individual that is involved in insolvency proceedings, possibly with new owners, including arrangement, suspension of payment, reconstruction, reorganization, or similar processes, with distributions to creditors and/or shareholders or other equity holders of cash, property and/or obligations of, or interests in, the rehabilitated business.

Discharge. A court order or provision of an instrument effecting a composition releasing a debtor from all liabilities that were, or could have been, addressed in the insolvency proceeding, including contracts that were modified as part of a composition.

Distribution. Allocation of estate property among creditors and/or shareholders or other equity interests.

Insolvency Proceeding/Forum. Any proceeding over which a court or other official forum presides with respect to the insolvency of an entity or individual, which may be a plenary or limited proceeding.

International Law. The laws governing relations among parties of diverse nationalities.

Limited Proceeding. An insolvency proceeding that is not a plenary proceeding. Limited proceedings include secondary and ancillary proceedings.

Liquidation. A proceeding with the goal of selling the debtor's business, either as a going concern or otherwise, with distribution of proceeds to creditors.

Main Forum/Proceeding. The exclusive or primary plenary forum/proceeding.

Non-Local Creditors. Creditors who are neither nationals nor domiciliaries of the forum in question.

Official Representative. A representative of the entity or individual that has commenced insolvency proceedings, or the estate created thereby, or its or his/her creditors, which may include an administrator, liquidator, trustee, supervisor or debtor-in-possession.

Plenary Forum/Proceeding. A forum or insolvency proceeding which addresses, on a plenary basis, administrative matters, including, on the one hand, operation or

liquidation of the debtor's business or assets, and, on the other hand, the filing, processing and allowance of claims and distribution to creditors.

Privileged Claim. A claim that, pursuant to statutory or other law, or pursuant to ranking rules, is given a preference or priority over common claims, including a public law claim arising from the public law of a nation.

Ranking Rules. The rules by which claims and equity interests are ranked.

Secured Claim. A claim that is a valid charge upon or interest in collateral to the extent of the value of the collateral.

Voiding Rules. Rules relating to voidness, voidability or enforceability of claims or pre-insolvency transactions.

APPENDIX 2

Major Cross-Border Insolvency Protocols

1. *Cross-Border Insolvency Protocol in Re Matlack Inc. Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley), Case No. 01-CL-4109 (April 19, 2001) and United States Bankruptcy Court for the District of Delaware (Hon. Mary F. Walrath) Case No. 01-1114 (MFW)(May 24, 2001) incorporating and approving the American Law Institute Guidelines for Court-to-Court Communications in Cross-Border Cases.*
2. *Cross-Border Insolvency Protocol in Re American Eco Corporation. United States District Court for the District of Delaware (Hon. Susan L. Robinson) Case No. 00-3253 (SLR) (August 4, 2000) and Ontario Superior Court of Justice, Toronto (Madam Justice Swinton), Case No. 00-CL-3841 (August 4, 2000).*
3. *Cross-Border Insolvency Protocol in Re AgriBioTech Inc. between Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley) Case No. 31-OR-3714 48 (June 16, 2000) and United States Bankruptcy Court for the District of Nevada (Hon. Linda B. Riegle) Case No. 500-10534 LBR (June 28, 2000).*
4. *Cross-Border Insolvency Protocol in Re Manhattan Investment Fund Limited United States Bankruptcy Court for the Southern District of New York (Hon. Burton R. Lifland) Case No. 00-10922BRL (April 2000) and High Court of Justice of the British Virgin Islands (Chief Justice Austin Ward) Case No. 19 of 2000 (April, 2000) and Supreme Court of Bermuda Case No. 2000/37 (Mr. Justice Kenneth A. Benjamin) Case No. 2000/37(April 2000).*
5. *Cross-Border Insolvency Protocol in Re Inverworld Inc. between the United States District Court for the Western District of Texas (Hon. Frederick Biery) (Case No. SA99-C0822FB) (October 22, 1999) and U.K. High Court of Justice, Chancery Division, (1999) and the Grand Court of the Cayman Island, (1999).*
6. *Cross-Border Insolvency Protocol in Re Philip Services Corporation United States Bankruptcy Court for the District of Delaware (Hon. Mary Walrath) Case No. 99-B-02385 (June 28, 1999) and Ontario Superior Court of Justice, Toronto (Mr. Justice Robert A. Blair) Case No. 99-CL-3442 (June 25, 1999).*
7. *Cross-Border Insolvency Protocol in Re Livent Inc. (United States Bankruptcy Court for the Southern District of New York (Hon. Arthur Gonzales) Case No. 98-B-48312 and Ontario Superior Court of Justice, Toronto (Mr. Justice J.D. Ground) Case No. 98-CL-3162. (June 11, 1999.)*

8. *Cross-Border Insolvency Protocol in Re Loewen Group United States Bankruptcy Court for the District of Delaware (Chief Judge Peter J. Walsh) Case No. 99-1244 (June 30, 1999) and Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley) Case No. 99-CL-3384 (June 1, 1999).*
9. *Cross-Border Liquidation Protocol in Re AIOC Corporation and AIOC Resources AG between United States and Switzerland: United States Bankruptcy Court for Southern District Court of New York (Chief Judge Tina L. Brozman). Case Nos. 96 B 41895 and 96 B 41896 (April 3, 1998).*
10. *Cross-Border Insolvency Protocol in Re Solv-Ex Canada Limited and Re Solv-Ex Corporation between Alberta Court of Queen's Bench (Mr. Justice G.R. Forsyth). Case No. 9701-10022 (January 28, 1998) and United States Bankruptcy Court for the District of New Mexico (Hon. Mark McFeely) Case No. 11-97-14362-MA. (January 28, 1998).*
11. *Draft Cross-Border Liquidation Protocol in Re Tee-Comm Electronics Inc. between Ontario Court of Justice and United States Bankruptcy Court for the District of Delaware (June 27, 1997).*
12. *Cross-Border Insolvency Protocol between the United States and Israel in Re Nakash: United States Bankruptcy Court for the Southern District of New York Case No. 94 B 44840 May 23, 1996) and District Court of Jerusalem; Case No. 1595/87 (May 23, 1996).*
13. *Order Co-ordinating Canadian and United States Reorganizational Plans in Re Everfresh Beverages Inc. (Ontario Court of Justice; Toronto (Mr. Justice J.M. Farley). (May 15, 1996).*
14. *Orders Approving Cross-Border Insolvency Protocol between Canada and the United States in Re Everfresh Beverages Inc.: Ontario Court of Justice, Toronto (Mr. Justice J.M. Farley) Case No. 32-077978. (December 20, 1995) and United States Bankruptcy Court for the Southern District of New York. (Hon. Burton R. Lifland) Case No. 95 B 45405 (December 20, 1995).*
15. *Protocol in Re Commodore Electronics Limited between United States Bankruptcy Court for the Southern District of New York (Hon. James L. Garrity, Jr.) and the Supreme Court of the Supreme Court of the Bahamas and Reasons for Decision, Supreme Court of the Bahamas (Case No. 473/1994; May 27, 1995).*
16. *Cross-Border Protocol in Re Olympia & York Developments Limited between Ontario Court of Justice, Toronto. (Mr. Justice R.A. Blair) and United States Bankruptcy Court for the Southern District of New York (Hon. James L. Garrity,*

Jr.) (Reasons for Decision of the Ontario Court of Justice: (1993), 20 C.B.R. (3d) 165).

17. *Cross-Border Insolvency Protocol and Order Approving Protocol in Re Maxwell Communication plc between the United States and the United Kingdom. United States Bankruptcy Court for the Southern District of New York (Hon. Tina L. Brozman) Case No. 91 B 15741 (January 15, 1992) and the High Court of Justice, Chancery Division Companies Court: No. 0014001 of 1991: December 31, 1991.*

APPENDIX 3

Proposed Framework for a Model Voluntary Cross-Border Restructuring Statute

(Working Paper: August 1, 2000)

The recent work of the Insolvency Working Group of the United Nations Commission on International Trade Law (UNCITRAL) highlights the growing international consensus that an effective national insolvency system is critical to access of domestic businesses to the international capital and credit markets and to reducing the adverse impact of business failures on a nation's economy. Most nations participating in UNCITRAL's Insolvency Working Group also appear to agree that an essential feature of an effective national insolvency system is a cost effective method of rescuing troubled businesses.

The growing consensus that rescue is an essential alternative to liquidation of troubled businesses is understandable. Rescues involve, in various combinations, the postponement, adjustment or refinancing of existing debt obligations, the infusion of new capital, the sale of assets, and even the exchange of existing debt for equity. However, despite the diversity of rescue techniques, the goals of all successful rescues are the same. They preserve an ongoing business enterprise, they preserve employment and, by preserving the going concern value of the business, they typically maximize the value available to satisfy claims. These common features strongly favor structuring national insolvency systems to facilitate rescue. Rescues generally take one of two forms: voluntary restructurings with little or no court involvement ("out-of-court restructurings") and restructurings under formal judicial supervision ("court supervised restructurings"). Voluntary out-of court restructurings often are the lowest cost way of resolving an insolvent company's financial difficulties. They involve the voluntary, negotiated resolution of financial difficulties and can avoid many of the costs, delays and difficult distributional issues faced in the context of plenary, court supervised, insolvency proceedings.

Voluntary out-of-court restructurings typically are less comprehensive than plenary, court supervised restructurings. Often they affect only lenders, bondholders and shareholders. This makes them easier to accomplish than court supervised restructurings, which typically affect all claims, including trade, employee and governmental claims.¹ In spite of the advantages afforded the holders of claims that are

¹ It has proved exceedingly difficult to accomplish out-of-court restructurings that affect classes of creditors other than lenders and bondholders. This is due to the large number of parties whose

not affected by a voluntary out-of-court restructuring, lenders and bondholders find it in their interest to participate in voluntary out-of-court restructurings because they often will suffer even greater losses if plenary insolvency proceedings are commenced. Voluntary out-of-court restructurings also accommodate need for prompt resolution that is essential for successful rescues but not always possible in plenary insolvency proceedings.

Because of the importance of voluntary out-of-court restructurings to a properly functioning insolvency system, this paper proposes that UNCITRAL explore how national insolvency systems might be restructured to facilitate such restructurings.²

The Need For A Model Statute

Voluntary restructurings are often impeded by the ability of individual creditors to take enforcement action and by the need for unanimous creditor consent to alter the repayment terms of existing classes of debt. These problems are magnified in the context of complex, multinational businesses, where it is especially difficult to obtain consents from all relevant parties. It is critical, therefore, that a “rescue” culture evolve that encourages voluntary cooperation and participation by creditors and other participants in out-of-court restructurings. Among other things, creditors should be encouraged to conduct themselves in accordance with principles like those proposed in the “Global Approach to Multi-Creditor Workouts” currently being considered by the Lenders Group of INSOL International.

Even, however, where an effective rescue culture is in place, it is often difficult to obtain the necessary support to complete a restructuring due to the need to persuade large numbers of creditors of varying types and dispositions (i.e., banks, bondholders and debt traders). This is due in part to the “hold out” problem, where a few small creditors try to take advantage of their blocking position by refusing to agree to a restructuring that most creditors believe is in the best interests of all concerned. These creditors hope to extract better terms for themselves at the expense of other parties. In response, other creditors may refuse to agree and the entire restructuring may fail. This problem is even greater where creditors come from many different countries and commercial cultures.

participation would have to be solicited and to the complexities involved in trying to address vendor and employee claims outside of formal insolvency proceedings.

² A mechanism to accomplish voluntary restructurings is especially useful in the case of substantial international borrowings by a large company with multinational interests. Thus, the model legislation proposed in this paper is specifically designed to address such complex cross border situations. The concepts could, of course, be applied equally to purely domestic situations.

Accordingly, to facilitate restructurings and support an effective rescue culture, there is a need for a legal mechanism that makes it possible to bind the dissident minority of creditors to go along with the great majority who wish to settle with the debtor and keep its business alive, so long as a threshold standard of treatment that appropriately protects the interests of the dissenting minority is achieved by a restructuring. Such mechanisms are found within many countries' insolvency laws, but are not readily applied to cross-border situations.³

Domestic insolvency laws that require a minority of creditors to accept majority rule typically provide for independent review of the restructuring to assure that the minority is not being abused. International creditors may, however, be reluctant to accept a mechanism that subjects them to inconsistent rulings by local courts in various affected countries. They may also be hesitant to accept a given country's standard of review. On the other hand, if international creditors are assured that the mechanism to bind "hold outs" also provides for a single, independent review under an acceptable international standard, they will be much more comfortable making loans to or buying bonds from borrowers who are in jurisdictions that provide such assurance.

A Model Voluntary Cross Border Restructuring Statute would provide for an expedited, statutory procedure for implementing a voluntary restructuring of borrowed money indebtedness (institutional lender debt and bonds) of insolvent international business enterprises based upon:

- (i) approval of the restructuring by a requisite *supermajority* of each affected class, and
- (ii) *independent review* of the adequacy of the restructuring applying *appropriate international restructuring standards*.

Eligible Debtors

The procedures under the Model Statute would be available to any insolvent or defaulting business enterprise with substantial borrowings from foreign persons. Size criteria, criteria for proving insolvency/default status,⁴ and criteria for establishing that sufficient amounts of debt held by foreigners would have to be established in the Model Statute. Different countries might decide to adopt different criteria in this regard.

³ A legal procedure for dealing with hold outs such as the one described in this paper is an adjunct to and not a substitute for an effective rescue culture. It complements and supports such a rescue culture by dealing with the small minority of parties who might otherwise seek to disrupt the restructuring process.

⁴ For example, the criteria for eligibility might be a declaration by the company of a current or prospective inability to pay its debts when due.

Certain types of regulated debtors (for example, financial institutions and insurance companies) might be made ineligible for restructuring under the Model Statute.

Parties Affected

Under the Model Statute, restructurings would be accomplished by a supermajority vote of each affected class of claimants. However, only borrowed money indebtedness (institutional and public, whether secured or unsecured) and other similar financial obligations could be adjusted by such a vote.⁵ Indebtedness held by other creditors could not be affected unless such creditors individually agreed to adjustment of their claims. Thus, indebtedness to trade creditors, employees, taxing authorities, etc., would “ride through” (i.e., not be affected by) restructurings under the Model Statute. Absent consent from each claimant, these liabilities could be affected only in domestic insolvency proceedings to the extent permitted under local law.

Common stockholders and other equity holders could, however, be affected by a restructuring under the Model Statute (for example by dilution of their equity position if debt were exchanged for equity as part of the restructuring).⁷

Moratorium

In many instances, restructurings can be accomplished, even after a default, as a result of the voluntary agreement of creditors to delay collection actions. However, in order to facilitate restructuring efforts, it may be advisable to include in the Model Statute an appropriately limited statutory moratorium on such actions, so that the actions of individual creditors do not prematurely precipitate insolvency proceedings, thereby thwarting restructuring efforts.

The Model Statute could provide that, in connection with making a bona fide restructuring proposal, an eligible company could declare a brief temporary moratorium that would suspend collection activities by affected classes. As noted above, only lenders, bondholders and shareholders, not vendors or employees, would be affected. The declaration of the moratorium would be publicly filed in the appropriate court and would specify whether all, or only certain, creditors and shareholders are subject to the moratorium.

⁵ In some countries it may be controversial to adjust the rights of secured creditors in this manner.

⁷ In some cases, the vote of shareholders might have to be solicited under applicable law to, among other things, increase the authorized capital stock of the corporation if necessary to consummate the restructuring.

The moratorium would be solely for the purpose of permitting the orderly proposal, negotiation and solicitation of approval of a restructuring. To be palatable, the initial moratorium period would have to be relatively short (e.g., 15 days), but might be subject to extension with the consent of holders of a material portion of creditors in affected classes (e.g., a further 30-60 days with the written approval of a majority in principal amount of each affected class of unsecured creditors).⁸ In addition, to protect affected parties, the moratorium could be designed to terminate if the debtor seeks to effect transactions (e.g., terminates its business or engages in substantial asset transfers) outside the ordinary course of business or seeks, outside of an approved restructuring, to afford preferential treatment to a subset of creditors.

Solicitation of Acceptances

After proposal of a restructuring and informal negotiations with representatives of affected creditors and shareholders⁹, the company would solicit acceptances of the negotiated restructuring proposal from affected creditors and equity security holders in accordance with otherwise applicable law.

Requisite Vote

The Model Statute would require that claims and interests be appropriately classified for voting purposes, and would establish requisite majorities in amount and number of claims of each class for approval of the restructuring.

It may be appropriate to require a substantial supermajority vote of each affected class (for example, 75% in number and face amount of those voting in each class) for approval of a restructuring.

Independent Determination of Adequacy of Restructuring Under International Criteria

Because the dissenting minority of creditors in each class would be bound by a restructuring under the Model Statute, it should be required that an independent determination be made regarding the adequacy of the restructuring to the dissenting minority of creditors applying appropriate international restructuring criteria. **Under the Model Statute, such criteria would be established and effectiveness of a**

⁸ A further extension of the moratorium might be permitted (with the written consent of a specified percentage of creditors in affected classes), to allow completion of the solicitation of votes for a restructuring.

⁹ It is typical in out-of-court restructurings for large claim holders to form informal negotiating committees. In order to facilitate the formation of such committees, the debtor company will often offer to pay their expenses. Although the Model Statute need not refer to such committees, they can be expected to form as part of the restructuring process.

restructuring would be conditioned upon a determination of adequacy by an independent expert, subject to final approval by an appropriate court.

An independent expert meeting explicit eligibility criteria would be identified.¹⁰ The expert, who would be compensated by the debtor company, would review the restructuring proposal, make findings regarding whether the international restructuring criteria had been met, and issue a report containing such findings. The proposal, together with the expert's report, would then be submitted for approval by an appropriate local court.

Notice and Criteria for Approval

The Model Statute would require publication or other appropriate notice to affected parties of completion of solicitation procedures and submission of the restructuring for review by the independent expert and final court approval. The Model Statute would expedite procedures for submissions to the independent expert in support and in opposition to the restructuring. Copies of these submissions would be filed with the Court. Presumably there would be a deadline for submissions (e.g., 20 days after publication of notice) and perhaps even a deadline for qualifying report (e.g., 30 days after completion of submissions to the independent fact finder).¹¹

Upon completion of the independent expert's report, proceedings would be commenced in an appropriate local court (the "Court") to obtain approval of the restructuring. In order to approve a restructuring over the vote of dissenting creditors in each affected class, the Model statute would require that the Court make certain findings of fact and law to establish the adequacy of the restructuring under appropriate international restructuring criteria, based upon the recommendations contained in the expert's report. For example, the international restructuring criteria might require the Court to conclude that:

- (i) the company is eligible to implement a restructuring under the Model Statute;
- (ii) the restructuring was proposed, negotiated and solicited in good faith;

¹⁰ Appropriate criteria and procedures for selecting a qualified independent expert could have to be included in the Model Statute.

¹¹ This period will have to be relatively short, as the Model Statute will presumably require the moratorium to continue while the independent expert is in the process of reviewing the submissions and the Court is making its final determination.

- (iii) disclosure to each affected class was adequate;¹²
- (iv) creditors and shareholders in affected classes were properly classified, and the requisite supermajorities of each affected class of creditors have agreed to the restructuring;
- (v) claims in affected classes having the same status and priority are receiving comparable treatment in connection with the restructuring (except to the extent they have expressly agreed otherwise);
- (vi) each non-assenting creditor in an affected class will receive in the restructuring property having a value at least equal to what it would receive if the Company were liquidated in plenary insolvency proceedings under local law;
- (vii) after effectuating the restructuring, the company is likely to meet its obligations when due; and
- (viii) in the event any class of affected equity holders fails to accept the plan, the aggregate indebtedness of the company exceeds the (debt free) value of its business as a going concern (i.e., the enterprise is insolvent).

The Court would be required to adopt the findings in the independent expert's report absent manifest error.

Declaration of Effectiveness

Upon approval of a restructuring by the Court and satisfaction of all conditions to effectiveness of the restructuring, notice to affected creditors would be published in accordance with procedures prescribed under the Model Statute, whereupon the Court would issue a "Declaration of Effectiveness," declaring the restructuring effective.

Under the Model Statute, the Declaration of Effectiveness would be given the effect of a binding judicial decree.

Discharge and Enforceability

The Declaration of Effectiveness would discharge any indebtedness extinguished under the terms of the restructuring, and local courts would be bound to enforce the restructuring in accordance with its terms.

¹² Such disclosure would presumably be required to include a valuation of the distributions to affected parties in connection with the restructuring and a comparison of such amounts to the value that would be realized by claimants in the affected classes if the debtor were liquidated.

Alternatives to Judicial Approval

The objective of the Model Statute is to permit the voluntary restructuring of claims in a cost effective and expeditious manner. Some states' judicial systems may afford the type of cost effective expedited review of restructuring proposals required under the Model Statute. In many states, however, it may be desirable to avoid the more cumbersome judicial process to enhance the potential for successful rescue, to preserve value, to prevent the loss of employment and production, and to lessen the systemic impact of failing enterprises. Accordingly, options should be considered, drawing upon already established practice, to validate restructurings utilizing non-judicial private ordering methods. In considering such alternatives reference can be made to existing structures. Such alternative procedures should be considered because approval procedures that foster expeditious and equitable voluntary out-of-court restructurings are critical to upgrading country risk factors and lessening systemic financial risk, as well as to facilitating both investment and the restructuring of invested capital when that is required.¹³

Necessary Adjustments to Local Law

Local laws, if any, requiring unanimous agreement to adjust indebtedness outside of insolvency would have to be modified so that adjustments of indebtedness in restructurings approved in accordance with the proposed Model Statute would be permitted. If local law causes directors or officers of a local business enterprise to be liable for trading while insolvent, it may also be appropriate to modify local law to provide for some form of relief, after appropriate disclosure, to allow ongoing trading while bona fide efforts to restructure under the Model Statute are under way.

¹³ A common dispute resolution mechanism included in modern bilateral and multilateral investment treaties and other related multilateral documents is binding international commercial arbitration. Such a system would need to be adjusted to accommodate decisions on a rapid basis and to provide dissenting claimants with an appropriate opportunity to be heard. Another possibility would be the establishment, with the imprimatur of recognized governmental or private sector international bodies, of pre-qualified panels of experts knowledgeable in the appropriate economic, industry and insolvency matters, and with appropriate knowledge of regional circumstances. For example, a large majority of countries (including many current members of UNCITRAL) are party to existing international arbitration award treaty systems, such as the New York and Panama Conventions, which provide for the enforcement of international commercial arbitration awards, and the International Centre for the Settlement of Investment Disputes (ICSID) arbitration system, which allows investors and other designated parties to resolve issues within states that are members of the ICSID treaty system. Reference might also be made to the UNCITRAL arbitration rules or other appropriate international arbitration rules for evaluation of private ordering plans on an ad hoc arbitration basis.

International Recognition

In order to enhance the likelihood that the restructurings under a home country's Model Statute will be honored by courts both at home and abroad, commercial parties could be encouraged to adopt a practice of expressly incorporating the applicability of the Model Statute into the terms of companies' debt obligations. The Model Statute could also provide that the right to restructure indebtedness after insolvency under the Model Statute is an implied term of each obligation incurred by a local debtor unless expressly disclaimed.

To the extent issues arise relating to the binding effect or enforceability of a restructuring under the Model Statute in courts of another jurisdiction, such issues should be addressed consistent with the notions of coordination and cooperation embodied in UNCITRAL's Model Law on Cross-Border Insolvency. To facilitate this, it may be desirable to provide in the Model Statute for a procedure whereby a debtor restructured under the Model Statute can obtain the appointment of a foreign representative who could be recognized in other countries for purposes of seeking enforcement of the terms of the restructuring.

Finally, the proposed Model Statute would also contain provisions granting recognition in local courts to restructurings of foreign debtors accomplished under the Model Statute as enacted in other countries.

APPENDIX 4
INSOL LENDERS GROUP
STATEMENT OF PRINCIPLES FOR
A GLOBAL APPROACH TO MULTI-CREDITOR WORKOUTS

INTRODUCTION

Set out below are the eight principles (the “Principles”) which should be regarded as statements of best practice for all multi-creditor workouts. This document also contains a commentary on the Principles generally and on each Principle separately.

While the Principles should be equally applicable in all jurisdictions which have developed insolvency laws, the commentaries should not be taken as definitive or necessarily appropriate in all respects to all jurisdictions. They are, nevertheless, intended to help with the interpretation of the Principles and their application in practice. Both the Principles and the commentaries may be supplemented locally as circumstances dictate.

PART I

THE PRINCIPLES

FIRST PRINCIPLE: Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient time (a “Standstill Period”) to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor's financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case.

SECOND PRINCIPLE: During the Standstill Period, all relevant creditors should agree to refrain from taking any steps to enforce their claims against or reduce their exposure to the debtor but are entitled to expect that during the Standstill Period their position relative to other creditors and each other will not be prejudiced.

THIRD PRINCIPLE: During the Standstill Period, the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared with the position at the Standstill Commencement Date.

FOURTH PRINCIPLE: The interests of relevant creditors are best served by co-ordinating their response to a debtor in financial difficulty. Such co-ordination will be facilitated by the selection of one or more representative co-ordination committees and

by the appointment of professional advisers to advise and assist such committees and, where appropriate, the relevant creditors participating in the process as a whole.

FIFTH PRINCIPLE: During the Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to, all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.

SIXTH PRINCIPLE: Proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the Standstill Commencement Date.

SEVENTH PRINCIPLE: Information obtained for the purposes of the process concerning the assets, liabilities and business of the debtor and any proposals for resolving its difficulties should be made available to all relevant creditors and should be treated as confidential.

EIGHTH PRINCIPLE: If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors.

Amended - February 12, 2001

APPENDIX 5**Guidelines****Applicable to Court-to-Court Communications
in Cross-Border Cases***Introduction:*

One of the most essential elements of cooperation in cross-border cases is communication among the administering authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

The Guidelines at this time contemplate application only between Canada and the United States, because of the very different rules governing communications with Principles of Cooperation courts and among courts in Mexico. Nonetheless, a Mexican Court might choose to adopt some or all of these Guidelines for communications by a *sindico* with foreign administrators or courts.

A Court intending to employ the Guidelines - in whole or part, with or without modifications - should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in

connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

- (a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means in which case Guideline 7 shall apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate.
- (d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the

communication which, with the approval of the Court, can be treated as an official transcript of the communication;

- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate;
- (d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

- (a) Each Court should be able to simultaneously hear the proceedings in the other Court.
- (b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.
- (c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.
- (d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate

and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

- (e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List which may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction (“Non-Resident Parties”). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

APPENDIX 6

Selected Provisions of the
UNCITRAL Model Law and Guide to Enactment

Guide to Enactment of the Model Law

Introduction: Cross-Border Co-operation

38. A widespread limitation on co-operation and coordination between judges from different jurisdictions in cases of cross-border insolvency is derived from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, for pursuing co-operation with foreign courts.

39. Experience has shown that, irrespective of the discretion courts may traditionally enjoy in a State, the passage of a specific legislative framework is useful for promoting international co-operation in cross-border cases. Accordingly, the Model Law fills the gap found in many national laws by expressly empowering courts to extend co-operation in the areas covered by the Model Law (Articles 25-27).

40. For similar reasons, provisions are included authorizing co-operation between a court in the enacting State and a foreign representative and between a person administering the insolvency proceeding in the enacting State and a foreign court or a foreign representative (Article 26).

41. The Model Law lists possible forms of co-operation and leaves the legislator an opportunity to list others (Article 27). It is advisable to keep the list, when enacted, illustrative rather than exhaustive so as not to stymie the ability of courts to fashion remedies in keeping with specific circumstances.

Coordination of relief when proceedings take place concurrently

44. The Model Law deals with coordination between a local proceeding and a foreign proceeding concerning the same debtor (Article 29) and

facilitates coordination between two or more foreign proceedings concerning the same debtor (Article 30). The objective of the provisions is to foster coordinated decisions that would best achieve the objectives of both proceedings (e.g. maximization of the value of the debtor's assets or the most advantageous restructuring of the enterprise). In order to achieve satisfactory coordination and to be able to adapt relief to changing circumstances, the court is in all situations covered by the Model Law, including those that limit the effects of foreign proceedings in the face of local proceedings, directed to cooperate to the maximum extent possible with foreign courts and the foreign representatives (Articles 25 and 30).

The UNCITRAL Model Law on Cross-Border Insolvency

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

- (a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Guide Commentary: Subparagraph (a):

133. It is possible that, after the application for recognition or after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition. For example, the foreign proceeding may be terminated or transformed from a liquidation proceeding into a reorganization proceeding, or the terms of the appointment of the foreign representative may be modified or the appointment itself terminated.

Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the terms of the appointment are frequent,

but that only some of those modifications are such that they would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of "substantial" changes. The court would likely be particularly anxious to be kept so informed when its decision on recognition concerns a foreign "interim proceeding" or a foreign representative has been "appointed on an interim basis" (see article 2, subparagraphs (a) and (d)).

Guide Commentary: *Subparagraph (b):*

134. Article 15, paragraph 3, requires that an application for recognition be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Article 18, subparagraph (b), extends that duty to the time after the application for recognition has been filed. That information will allow the court to consider whether relief already granted should be coordinated with the existence of the insolvency proceedings that have been commenced after the decision on recognition (see Article 30).

*Article 25. Co-operation and direct communication
between a court of this State and foreign courts
or foreign representatives*

1. In matters referred to in Article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]*.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Guide Commentary:

179. The ability of courts, with appropriate involvement of the parties, to communicate "directly" and to request information and assistance "directly" from foreign courts or foreign representatives is intended to

avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. This ability is critical when the courts consider that they should act with urgency. In order to emphasize the flexible and potentially urgent character of co-operation, the enacting State may find it useful to include in the enactment of the Model Law an express provision that would authorize the courts, when they engage in cross-border communications under Article 25, to forgo use of the formalities (e.g. communication via higher courts, letters rogatory or other diplomatic or consular channels) that are inconsistent with the policy behind the provision.

*Article 26. Co-operation and direct communication
between the [insert the title of a person or body
administering a reorganization or liquidation
under the law of the enacting State] and
foreign courts or foreign representatives*

1. In matters referred to in article 1, a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

2. The *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Guide Commentary:

180. Article 26 on international co-operation between persons who are appointed to administer assets of insolvent debtors reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority. The provision makes it clear that an insolvency administrator acts under the overall supervision of the competent court (by stating "in the exercise of its

functions and subject to the supervision of the court"). The Model Law does not modify the rules already existing in the insolvency law of the enacting State on the supervisory functions of the court over the activities of the insolvency administrator. Generally, a certain degree of latitude and initiative on the part of administrators, within the broad confines of judicial supervision, are mainstays of co-operation in practical terms; it is therefore advisable that the enacting State does not change that in enacting the Model Law. In particular, there should be no suggestion that ad hoc authorization would be needed for each communication between the administrator and a foreign body.

Article 27. Forms of co-operation

Co-operation referred to in Articles 25 and 26 may be implemented by any appropriate means, including:

- (a) Appointment of a person or body to act at the direction of the court;
- (b) Communication of information by any means considered appropriate by the court;
- (c) Coordination of the administration and supervision of the debtor's assets and affairs;
- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) Coordination of concurrent proceedings regarding the same debtor;
- (f) *[The enacting State may wish to list additional forms or examples of co-operation].*

Guide Commentary:

181. Article 27 is suggested to be used by the enacting State to provide courts with an indicative list of the types of co-operation that are authorized by articles 25 and 26. Such an indicative listing may be particularly helpful in States with a limited tradition of direct cross-border judicial co-operation and in States where judicial discretion has, traditionally been limited. Any listing of forms of possible co-operation should not purport to be exhaustive, as this might inadvertently preclude certain forms of appropriate co-operation.

182. The implementation of co-operation would be subject to any mandatory rules applicable in the enacting State; for example, in the case of requests for information, rules restricting the communication of information (e.g. for reasons of protection of privacy) would apply.

183. Subparagraph (f) of Article 27 offers the enacting State the possibility to include additional forms of possible co-operation. Those might include, for example, suspension or termination of existing proceedings in the enacting State.

*Article 30. Coordination of more than
one foreign proceeding*

In matters referred to in Article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek co-operation and coordination under Articles 25, 26 and 27, and the following shall apply:

- (a) Any relief granted under Article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under Article 19 or 21

shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

- (c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Guide Commentary:

192. Article 30 deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies whether or not an insolvency proceeding is pending in the enacting State. If, in addition to two or more foreign proceedings, there is a proceeding in the enacting State, the court will have to act pursuant to both Article 29 and Article. 30.

193. The objective of Article 30 is similar to the objective of Article 29 in that the key issue in the case of concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Such consistency will be achieved by appropriate tailoring of relief to be granted or by modifying or terminating relief already granted. Unlike Article 29 (which, as a matter of principle, gives primacy to the local proceeding), Article 30 gives preference to the foreign main proceeding if there is one. In the case of more than one foreign non-main proceeding, the provision does not a priori treat any foreign proceeding preferentially. Priority for the foreign main proceeding is reflected in the requirement that any relief in favour of a foreign non-main proceeding (whether already granted or to be granted) must be consistent with the foreign main proceeding (Article 30, subparagraphs (a) and (b)).